INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

VOLUME IX
Verbatim Records of the Hearings

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

VOLUME IX
Comptes rendus d'audience

Abbreviated reference:

I.C.J. Pleadings, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Vol. IX

Référence abrégée:

C.I.J. Mémoires, Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), vol. IX

ISSN 0074-4433
ISBN 978-92-1-071084-8

Sales number
N° de vente: **972**

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN
(INDONESIA/MALAYSIA)

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN
(INDONÉSIE/MALAISIE)

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

VOLUME IX

Verbatim Records of the Hearings

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

VOLUME IX

Comptes rendus d'audience

IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

This case, entered on the Court's General List on 2 November 1998 under number 102, was the subject of Judgments delivered on 23 October 2001 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575) and 17 December 2002 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625).

The documents relating to the case are being published in the following order:

Volume I. Special Agreement; Memorial of Indonesia.
Volume II. Memorial of Indonesia *(continuation)*.
Volume III. Memorial of Indonesia (Affidavits and Maps).
Volume IV. Memorial of Malaysia.
Volume V. Memorial of Malaysia (Maps).
Volume VI. Counter-Memorial of Indonesia.
Volume VII. Counter-Memorial of Malaysia; Reply of Indonesia.
Volume VIII. Reply of Malaysia; Application for Permission to Intervene by the Philippines; Written Observations of Indonesia and Malaysia; Verbatim Records of the Hearings.
Volume IX. Verbatim Records of the Hearings *(continuation)*.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2010.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 102 le 2 novembre 1998, a fait l'objet d'arrêts rendus le 23 octobre 2001 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), requête à fin d'intervention, arrêt, C.I.J. Recueil 2001*, p. 575) et le 17 décembre 2002 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 625).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant:

Volume I. Compromis; mémoire de l'Indonésie.
Volume II. Mémoire de l'Indonésie *(suite)*.
Volume III. Mémoire de l'Indonésie (déclarations sous serment et cartes).
Volume IV. Mémoire de la Malaisie.
Volume V. Mémoire de la Malaisie (cartes).
Volume VI. Contre-mémoire de l'Indonésie.
Volume VII. Contre-mémoire de la Malaisie; réplique de l'Indonésie.
Volume VIII. Réplique de la Malaisie; requête à fin d'intervention des Philippines; observations écrites de l'Indonésie et de la Malaisie; comptes rendus d'audience.
Volume IX. Comptes rendus d'audience *(suite)*.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement*; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

La Cour souhaitant que lesdits documents paraissent aussi rapidement que possible, il a été décidé, chaque fois que les moyens techniques le permettraient, de reproduire les pièces de procédure en l'état où elles ont été présentées par les parties.

Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios: outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2010.

CONTENTS — TABLE DES MATIÈRES

Page

Oral Arguments on the Merits — Plaidoiries sur le fond

CR 2002/27

OPENING OF THE ORAL PROCEEDINGS . . . 1
DÉCLARATION DU PRÉSIDENT GUILLAUME . . . 7
STATEMENT BY MR. WIRAJUDA (INDONESIA) . . . 9
  Introductory remarks . . . 9
  The origins of the dispute . . . 10
  The status quo agreement . . . 11
  Concluding remarks . . . 13
ARGUMENT OF MR. WATTS (INDONESIA) . . . 14
  Overview of the case . . . 14
ARGUMENT OF MR. SOONS (INDONESIA) . . . 21
  The historical context: the involvement of the Netherlands and Great Britain in North-East Borneo prior to the 1891 Anglo-Dutch Convention . . . 21
    Introduction . . . 21
    The situation in Borneo before the start of European expansion towards north-eastern Borneo . . . 22
    The Dutch taking control of north-eastern Borneo . . . 25
    The origins of the State of North Borneo . . . 29
PLAIDOIRIE DE M. PELLET (INDONÉSIE) . . . 32
  Le contexte et l'objet de la convention de 1891 . . . 32
    I. Les rapports au territoire des sultans de la région au moment de la colonisation . . . 34
    II. La présence de Boeloengan et des Pays-Bas au nord, et l'absence de Sulu et du Royaume-Uni au sud, du parallèle 4° 10′ nord avant 1891 . . . 39
    III. Le règlement définitif du différend territorial par la convention de 1891 . . . 45
ARGUMENT OF MR. WATTS (INDONESIA) . . . 51
  The 1891 Convention . . . 51
    Introduction . . . 51
    Terms of the Convention . . . 52
    (*a*) Object and purpose . . . 52

CR 2002/28

ORAL PROCEEDINGS . . . 55
ARGUMENT OF MR. WATTS (INDONESIA) . . . 61
    (*b*) Article I . . . 61
    (*c*) Articles II and III . . . 61

Page

(*d*) Article IV. 61

Explanatory memorandum map 68
Amended Contract of Vassalage 76
1915 and 1928 Anglo-Dutch agreements 76

ARGUMENT OF MR. SOONS (INDONESIA) 78

Confirmation of Dutch title to the islands post-1891 79
Introduction 79
Maps issued by Stanford's Geographical Establishment, the BNBC's official cartographer 79
Dutch exercises of State functions: the activities of the Royal Netherlands Navy 82
Significance of the internal Dutch deliberations on territorial sea delimitation 88

ARGUMENT OF MR. BUNDY (INDONESIA) 91

The defects in Malaysia's treaty-based chain of title . . . 91
A. Introduction 91
B. Malaysia's claim that title passed from the Sultan of Sulu to Spain, thence to the United States, thence to Great Britain and finally to Malaysia 92
1. The Sultan of Sulu did not possess sovereignty over Ligitan or Sipadan 94
2. Spain never possessed title to the islands 95
(*a*) The 1836 Capitulation between Spain and Sulu 95
(*b*) The 1851 Act of Submission. 96
(*c*) The 1885 Protocol 96
3. The lack of any United States claim over the islands . . 98
(*a*) The 1898 and 1900 Spanish-United States Treaties . . . 99
(*b*) The voyage of the *"Quiros"* and the 1903 United States provisional map 100
(*c*) The 1903 Confirmation of Cession also supports Indonesia's case 104

CR 2002/29

ORAL PROCEEDINGS 107

ARGUMENT OF MR. BUNDY (INDONESIA) 113

(*d*) The 1907 Exchange of Notes is of no assistance to Malaysia as far as the question of sovereignty is concerned 113
4. The islands were not ceded to Great Britain under the 1930 Anglo-United States Convention 116
C. Conclusions 118

PLAIDOIRIE DE M. PELLET (INDONÉSIE) 118

L'absence de titre malaisien fondé sur les effectivités. . . 118
I. La pertinence limitée des «effectivités» dans le présent différend . . 119
II. Les effectivités dont se prévaut la Malaisie n'ont pu ni créer, ni déplacer un titre territorial 123

Page

a) Une liste d'effectivités en trompe-l'œil 124
b) La collecte des œufs de tortues sur Sipadan 127
c) La proclamation d'une réserve d'échassiers à Sipadan 130
d) La construction et l'entretien des lanternes lumineuses 131
e) Conclusion provisoire sur les effectivités 133

PLAIDOIRIE DE MME MALINTOPPI (INDONÉSIE) 137

L'importance de la cartographie dans l'affaire Indonésie/Malaisie 137

I. Introduction 137
II. Les cartes qui traduisent l'opinion des signataires sur l'interprétation de la convention de 1891 139
a) Les cartes antérieures à la convention de 1891 139
b) La carte annexée au «Mémorandum explicatif» néerlandais 140
c) Les cartes officielles publiées après la conclusion de la convention de 1891 141
III. Les cartes publiées par la Malaisie indépendante qui contredisent sa position actuelle 143
IV. Les cartes soumises à la Cour par la Malaisie 148

PLAIDOIRIE DE M. PELLET (INDONÉSIE) 151

La confirmation du titre indonésien par la conduite des Parties 151

I. Les comportements invoqués par la Malaisie sont dénués de pertinence 152
a) L'invasion touristique de Sipadan par la Malaisie 152
b) Le tracé de la limite des eaux archipélagiques indonésiennes de 1960 154
II. La coïncidence de la conduite des Parties le long du parallèle 4° 10′ nord 157
a) Les patrouilles navales indonésiennes 157
b) Les aides à la sécurité de la navigation 159
c) Les concessions pétrolières 160

CR 2002/30

ORAL PROCEEDINGS 165
DÉCLARATION DU PRÉSIDENT GUILLAUME 171
STATEMENT BY MR. MOHAMAD (MALAYSIA) 172

The islands of Ligitan and Sipadan form part of the State of Sabah in Malaysia 172
The dispute over the islands affects important interests of Malaysia 172
Malaysia's case is clear and finds strong support in the evidence 173
The facts concerning Malaysia's title 174
Indonesia has failed to provide evidence to substantiate its case 175
The so-called "Standstill Agreement" and the issue of oil practice 176
The issue before the Court 177

ARGUMENT OF MRS. ARIFFIN (MALAYSIA) 178
ARGUMENT OF MR. LAUTERPACHT (MALAYSIA) 185
ARGUMENT OF MR. SCHRIJVER (MALAYSIA) 196

Dutch claims to Borneo's east coast and islands before 1891 196
Introduction 196

Page
I. Dutch colonization of Borneo started late and was desultory . . . 198
II. Bulungan was a mainland-based Sultanate in eastern Borneo . . . 199
III. Dutch contracts with Bulungan did not pertain to the Ligitan group of islands . . . 201
IV. No Dutch sovereignty was ever claimed east of Batu Tinagat . . . 202
V. There was no exercise of jurisdiction over the islands . . . 203
VI. Conclusion . . . 204

ARGUMENT OF MR. CRAWFORD (MALAYSIA) . . . 205

The extent of British North Borneo in 1891 and its implications for Indonesia's claim . . . 205
Introduction and overview . . . 205
Transactions affecting North Borneo and the islands before 1891 . . . 210
The extent of the Sultanate of Sulu before 1878 and the scope of the 1878 Grant . . . 211
The establishment of the BNBC . . . 215
The Protocol of 1885 . . . 215
The establishment of the British Protectorate . . . 217
Conclusion . . . 217

CR 2002/31

ORAL PROCEEDINGS . . . 220
PLAIDOIRIE DE M. COT (MALAISIE) . . . 226

La convention du 20 juin 1891 . . . 226
I. Le cadre général de la négociation du traité de 1891 . . . 227
II. Le texte de la Convention du 20 juin 1891 . . . 230
III. La technique des périmètres d'attribution . . . 233
1. Le périmètre d'attribution n'est pas une délimitation maritime . . . 233
2. *Surtout*, le périmètre d'attribution est toujours précisé explicitement dans le traité de référence . . . 236
IV. Les travaux préparatoires . . . 238
V. La procédure de ratification et la carte annexée au mémorandum interne du Gouvernement néerlandais . . . 245
VI. Les accords ultérieurs intervenus entre les parties . . . 251

ARGUMENT OF MR. CRAWFORD (MALAYSIA) . . . 255

Malaysia's title to the islands: transactions in the period 1900-1932 . . . 255
Introduction . . . 255
Transactions concerning the islands post-1891 . . . 255
(a) Transactions leading to the 1907 Exchange of Notes . . . 256
(b) The effect of the Anglo-American Boundary Convention of 1930 . . . 264
Conclusion . . . 267

ARGUMENT OF MR. SCHRIJVER (MALAYSIA) . . . 269

Dutch practice after the conclusion of the 1891 Boundary Convention . . . 269
Introduction . . . 269
The local agreements after 1891 with Bulungan confirm the lack of any title to the islands . . . 270

Page

The occasional Dutch naval activities in the area were not exercises of territorial jurisdiction . . . 271
Internal Dutch deliberations during the 1920s on a maritime boundary east of Sebatik . . . 275
Conclusions . . . 276

CR 2002/32

ORAL PROCEEDINGS . . . 278
ARGUMENT OF MR. LAUTERPACHT (MALAYSIA) . . . 284
Effectivités . . . 284
ARGUMENT OF MR. CRAWFORD (MALAYSIA) . . . 293
The maps . . . 294
Introduction . . . 294
Category 1. The annexed maps . . . 295
Category 2. Maps embodying international claims by the originating State 297
The category 3 maps . . . 301
(a) The absence of any Dutch or Indonesian map claiming the islands on the basis of the 1891 Convention . . . 303
ARGUMENT OF MR. CRAWFORD (MALAYSIA) . . . 305
(b) The oil practice of the Parties . . . 305
(c) Maps showing lines in the sea . . . 306
Conclusion . . . 311
DÉCLARATION DU PRÉSIDENT GUILLAUME . . . 313

CR 2002/33

ORAL PROCEEDINGS . . . 315
REPLY OF MR. WATTS (INDONESIA) . . . 321
Sipadan and Ligitan: Geographic considerations . . . 321
1891 Convention: object and purpose . . . 326
1891 Convention: *travaux préparatoires* . . . 326
1891 Convention . . . 328
1891 Convention: Explanatory Memorandum map. . . . 335
1915 and 1928 Agreements . . . 339
REPLY OF MR. SOONS (INDONESIA) . . . 341
Territory of Sultan of Boeloengan. Displays of sovereignty by the Netherlands. Internal Dutch deliberations on delimitation of the territorial sea off Sebatik Island . . . 341
I. The Netherlands acquired title to Sipadan and Ligitan through the Sultan of Boeloengan . . . 342
II. Displays of sovereignty over Sipadan and Ligitan by the Netherlands . 343
(a) Before 1891 . . . 343
(b) Hydrographic surveying . . . 344
(c) Dutch law enforcement/naval patrols . . . 346
III. The internal Dutch deliberations on the delimitation of the territorial sea off Sebatik Island . . . 350

Page

REPLY OF MR. BUNDY (INDONESIA) 353

Rebuttal of Malaysia's chain of title argument 353

A. Malaysia's failure to demonstrate that the Sultan of Sulu had title to the islands 353

B. Malaysia accepts that Spain was utterly indifferent to the islands . . . 355

C. The United States did not inherit Sipadan or Ligitan from Spain . . . 357

1. The 1900 Treaty 357

2. The events of 1903 360

3. The 1907 Exchange of Notes 362

4. The 1930 Anglo-American Convention 363

CR 2002/34

ORAL PROCEEDINGS 368

RÉPLIQUE DE MME MALINTOPPI (INDONÉSIE) 374

Introduction 374

1. Les cartes en tant qu'éléments de la pratique des parties à la convention de 1891 375

2. La présence récurrente de la ligne de la convention de 1891 dans la cartographie postérieure à cette date confirme la position indonésienne 378

3. Les cartes qui représentent des «Admissions against interest» par la Malaisie 379

4. Les cartes neutres en matière de souveraineté 380

RÉPLIQUE DE M. PELLET (INDONÉSIE) 383

La conduite des Parties 383

I. Les ineffectivités malaisiennes 384

***a)* Une présence épisodique acceptée par l'Indonésie** 386

***b)* Les documents établissant une compétence personnelle de la BNBC puis de la Grande-Bretagne sur les Bajau de Dinawan** . . . 387

***c)* Les «paper claims» (ou «map claims») britanniques** 388

***d)* Les documents ne mentionnant ni Ligitan, ni Sipadan** 390

II. «Quelques effectivités valent mieux qu'aucune» 391

III. La coïncidence du comportement des Parties 392

***a)* Le tracé des lignes de base** 395

***b)* Les aides à la navigation** 396

***c)* Les concessions pétrolières** 396

Récapitulation juridique 398

STATEMENT BY MR. WIRAJUDA (INDONESIA) 401

DÉCLARATION DU PRÉSIDENT GUILLAUME 402

CR 2002/35

ORAL PROCEEDINGS 403

DUPLIQUE DE M. COT (MALAISIE) 409

La convention du 20 juin 1891 409

I. Il n'y a jamais eu de proposition britannique de périmètre d'attribution 410

Page
II. La carte du «Mémorandum explicatif n° 3» n'a pas été communiquée au Gouvernement britannique . . . 411
REJOINDER OF MR. SCHRIJVER (MALAYSIA) . . . 417
Dutch claims and practice with respect to North-East Borneo and the islands in dispute . . . 417
Introduction . . . 417
I. The Sultanate of Bulungan did not hold any title to the islands . . . 417
II. Supposed Dutch claims to east of Batu Tinagat and the islands . . . 419
III. Internal Dutch deliberations in the 1920s on the absence of a maritime boundary . . . 421
REJOINDER OF MR. CRAWFORD (MALAYSIA) . . . 423
Malaysia's title to the islands in dispute . . . 423
Introduction . . . 423
A. Malaysia's title to the islands . . . 424
(1) The 1885 Protocol and the *nemo dat* argument . . . 424
(2) The 1900 Convention . . . 428
(3) The events of 1900-1907 . . . 429
(4) The 1930 Convention . . . 430
B. The map evidence . . . 432
(1) The "Ligitan Group" is not a concocted potion . . . 432
(2) The classification of map evidence . . . 434
(3) Ms Malintoppi's 24 maps . . . 434
Conclusion . . . 443
REJOINDER OF MR. LAUTERPACHT (MALAYSIA) . . . 444
Effectivités . . . 444
STATEMENT BY MR. MOHAMAD (MALAYSIA) . . . 455
CLOSING OF THE ORAL PROCEEDINGS . . . 458
READING OF THE JUDGMENT . . . 458

CR 2002/27

**International Court
of Justice**

THE HAGUE

**Cour internationale
de Justice**

LA HAYE

YEAR 2002

Public sitting

held on Monday 3 June 2002, at 10 a.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan
(Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le lundi 3 juin 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan
(Indonésie/Malaisie)**

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,
as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates
as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez-vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui, en application des articles 43 et suivants de son Statut, pour entendre les Parties en leurs plaidoiries en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie).*

Je rappellerai que chacune des Parties à la présente affaire, la République d'Indonésie et la Malaisie, ont usé de la faculté qui leur est conférée par l'article 31 du Statut de la Cour pour désigner un juge *ad hoc*. L'Indonésie avait désigné M. Mohamed Shahabuddeen. Celui-ci ayant démissionné de ses fonctions de juge *ad hoc* à la date du 20 mars 2001, elle a désigné M. Thomas Franck pour le remplacer. La Malaisie a pour sa part désigné M. Christopher Gregory Weeramantry. MM. Weeramantry et Franck ont été dûment installés comme juges *ad hoc* en l'affaire l'année dernière, à l'occasion de l'examen de la requête à fin d'intervention présentée par la République des Philippines; conformément au paragraphe 3 *in fine* de l'article 8 du Règlement de la Cour, ils n'ont pas à renouveler leur déclaration dans la présente phase de l'affaire.

*

* *

L'instance a été introduite le 2 novembre 1998 par la notification par l'Indonésie et la Malaisie d'un compromis visant à soumettre à la Cour un différend entre les deux Etats relatif à la souveraineté sur Pulau Ligitan et Pulau Sipadan. Par ordonnance en date du 10 novembre 1998, la Cour a fixé au 2 novembre 1999 et au 2 mars 2000, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire et d'un contre-mémoire par chacune des Parties, ce compte tenu des souhaits exprimés par celles-ci dans le compromis. Les mémoires des Parties ont été déposés dans le délai ainsi fixé. Par lettre conjointe du 18 août 1999, les Parties ont demandé à la Cour de reporter au 2 juillet 2000 la date d'expiration du délai pour le dépôt de leurs contre-mémoires. Par ordonnance en date du 14 septembre 1999, la Cour a accédé à cette demande. Par lettre conjointe du 2 mai 2000, les Parties ont demandé à la Cour un nouveau report d'un mois de la date d'expiration du délai pour le dépôt de leurs contre-mémoires. Par ordonnance du 11 mai 2000, la Cour a également accédé à cette demande. Les contre-mémoires des Parties ont été déposés dans le délai ainsi prorogé.

Aux termes du compromis, les deux Parties devaient présenter une réplique au plus tard quatre mois après la date à laquelle chacune aurait reçu la copie certifiée conforme du contre-mémoire de l'autre. Par lettre conjointe du 14 octobre 2000, les Parties ont prié la Cour de proroger ce délai de trois mois. Par ordonnance en date du 19 octobre 2000, le président de la Cour a fixé au 2 mars 2001 la date d'expiration du délai pour le dépôt d'une réplique par chacune des Parties. Les répliques ont été déposées dans le délai ainsi prescrit.

Le compromis prévoyant la possibilité de dépôt d'une quatrième pièce de procédure par chacune des Parties, celles-ci ont, par lettre conjointe du 28 mars 2001, informé la Cour qu'elles ne souhaitaient pas produire de pièce supplémentaire. La Cour elle-même n'en a pas vu la nécessité.

Le 13 mars 2001, les Philippines ont déposé au Greffe de la Cour une requête à fin d'intervention dans l'affaire, en invoquant l'article 62 du Statut. Par arrêt rendu le 23 octobre 2001, la Cour a dit que cette requête des Philippines ne pouvait être admise.

J'ajoute que la Cour, s'étant renseignée auprès des Parties, a décidé, en application du paragraphe 2 de l'article 53 de son Règlement, que des exemplaires des pièces de procédure et des documents annexés seront rendus accessibles au public à compter de ce jour. En outre, conformément à la pratique de la Cour, les pièces de procédure sans leurs annexes figureront sur le site Internet de la Cour et seront publiées ultérieurement dans la série *Mémoires, plaidoiries et documents* de la Cour.

Je constate la présence à l'audience des agents, conseils et avocats des deux Parties, que je suis heureux de saluer.

Conformément au calendrier des audiences arrêté par la Cour, après consultation des Parties, l'Indonésie sera entendue la première. Bien entendu, cette décision n'implique pas que l'Indonésie puisse être considérée comme Etat demandeur ou la Malaisie comme Etat défendeur, elle ne saurait en outre affecter aucune question relative à la charge de la preuve. Ceci étant précisé à la demande des Parties, je donne maintenant la parole à S.Exc. M. Hassan Wirajuda, agent de la République d'Indonésie.

Monsieur l'agent, vous avez la parole.

Mr. WIRAJUDA:

1. Mr. President, distinguished Members of the Court, it is a great honour for me to appear before you once again on behalf of my Government in this case.

Introductory remarks

2. As you are aware, this is the first dispute that has been referred by Special Agreement to the Court by two ASEAN countries. This is a very significant development, Mr. President. The Court will probably be aware that, since the establishment of the Association of Southeast Asian Nations (ASEAN) in 1967, south-east Asian countries have preferred to settle their disputes *en famille*. That method has its advantages: these countries were able to solve many, and in some cases even to shelve, disputes amongst them.

3. However, it is encouraging that two ASEAN countries have shown their confidence in the Court as a fair and impartial arbiter of disputes as well. This reflects a growing maturity in the relations among countries in the region and in their efforts to promote a regional order, peace and stability through abiding respect for justice and the rule of law as stipulated in the ASEAN Declaration of 1967. It is indeed within the spirit of the Declaration of ASEAN Concord of 1967, that ASEAN countries commit themselves to settle disputes peacefully. In the present instance, however, Indonesia's and Malaysia's efforts to resolve the dispute over Sipadan and Ligitan, which have been undertaken since the 1980s, failed to achieve an acceptable solution. Our States therefore agreed to submit the dispute to another procedure provided in the Charter of the United Nations, namely settlement by this distinguished Court.

4. It is a source of great pride to the Republic of Indonesia to have been responsible, jointly with our Malaysian colleagues, for taking this step to resolve a territorial dispute. We hope, and indeed believe, that this step taken by our two countries will provide a precedent that will be followed in the peaceful resolution of similar territorial disputes in the region.

5. Mr. President, distinguished judges, I realize that this is not the first time this Court has been called on to resolve a territorial dispute relating to small islands. One might wonder how such relatively modest features can give rise to such intractable disputes. But, large or small, States take

issues of sovereignty seriously, and Indonesia is no exception. Being a country comprised exclusively of islands, this case is particularly important to my Government and to the people of Indonesia.

6. We look to this distinguished Court for fairness and justice, and for a decision based on the rule of law that will satisfy the Parties to this dispute.

The origins of the dispute

7. So how did this particular dispute arise? If I may, let me explain very briefly the background and the context in which the matter arose. Further details are, of course, available in Indonesia's written pleadings.

8. Being an archipelagic State, Indonesia has sovereignty over more than 17,000 islands, among them Sipadan and Ligitan which have traditionally been uninhabited. It is not surprising, therefore, that Sipadan and Ligitan have not been the focus of intense activities over the years.

9. In the 1960s, both Indonesia and Malaysia were beginning to embark on a more intensive search for oil and gas under their territorial waters and continental shelf. Oil and gas production is obviously a critical factor in my country's economy and the Government was intent on opening up new areas for exploration and exploitation.

10. In our specific area of concern, Indonesia licensed an offshore exploration block in 1966 to a Japanese petroleum company called JAPEX. Two years later, Malaysia itself awarded a concession just to the north of the Indonesian licence to another Japanese company, TEISEKI. There was no overlap between these two particular licences because they both respected the agreed line separating the Parties' possessions along the 4° 10' North line of latitude. Nonetheless, the issuing of offshore petroleum permits by Indonesia and Malaysia, not simply in this area but elsewhere as well, was one of the factors which prompted the two Parties to recognize the need to negotiate continental shelf boundaries.

11. Representatives of the Parties met in Kuala Lumpur in September 1969 to discuss delimitation issues. Substantial progress was made, so much so that the two sides were able to conclude a delimitation agreement covering the Strait of Malacca and certain areas of the South

China Sea which bordered the two States in Borneo. The Court can find a copy of that agreement at Annex 136 to Indonesia's Memorial.

12. However, when the attention of the delegates turned to the areas lying off East Kalimantan and Sabah, they ran into problems. Much to the Indonesian team's surprise, Malaysia claimed ownership of Pulau Sipadan and Pulau Ligitan. Indonesia vigorously contested this view stating that the matter had been settled by the Anglo-Dutch Convention of 1891. Indonesia considered then, and it considers now, that the sanctity of treaties is very important and that States should stand by the treaties they enter into.

13. During the discussion, Indonesia also referred to various Malaysian maps which, as you will see during Indonesia's presentation today and tomorrow, showed the islands lying on Indonesia's side of the 4° 10' North line of latitude. In the circumstances, however, it was impossible to finalize a delimitation agreement in this area. In this regard, both Parties acknowledged the need to discuss related problems of maritime boundaries and the use of the seas between the two countries with the understanding that both should exercise self-restraint in order to maintain the status quo.

14. The Members of the Court will find a full account of the 1969 negotiations in Indonesia's written pleadings. I would, in particular, invite the Court to refer to the affidavits of Professor Mochtar Kusuma-atmadja, Indonesia's former Minister for Foreign Affairs and, until this year, Member of the International Law Commission, and Admiral Sumardiman filed with our Memorial (Vol. 5, Affidavits A and B). Both individuals participated in the 1969 negotiations, with Professor Mochtar leading Indonesia's team.

The status quo agreement

15. I have not seen anything in Malaysia's submissions which contradicts the account of the negotiations presented by Indonesia. Nonetheless, there is one point related to the discussions which, while our Malaysian colleagues seem to have passed over the issue in their written pleadings, has been a source of serious concern to Indonesia in the past. This involves the question of the "status quo" or standstill agreement reached during the negotiations with respect to Sipadan and Ligitan.

16. Up until the time of the 1969 discussions, the islands were uninhabited. Indonesia has provided evidence that Indonesian fishermen would often use the islands for shelter and fishing purposes. Malaysian fishermen may have done the same. But there were no buildings to speak of, and no official presence of either State.

17. In these circumstances, it was entirely natural that when the negotiators realized that the two sides held differing views regarding the ownership of Sipadan and Ligitan, they agreed that nothing should be done to complicate the situation further — in short, they agreed to maintain the status quo. This is nothing less than what international law would impose on the Parties in any event: a duty to act in good faith and not to take unilateral steps to worsen an existing dispute.

18. Indonesia has always respected this agreement. I would note that, for a period of about ten years after the 1969 discussions, the status quo understanding was respected by Malaysia as well. Unfortunately, starting in 1979, Malaysia changed its attitude towards the situation and began to take a series of unilateral steps — first by issuing maps showing the islands as Malaysian (in contrast to Malaysia's earlier cartography), and later by erecting a series of tourist installations on Sipadan. These actions were fundamentally incompatible with the standstill or "status quo" understanding.

19. Indonesia was obliged to protest. Indonesia also exercised considerable self-restraint not to take unilateral measures out of respect for a spirit of co-operation and in order to develop a culture of peaceful resolution of conflicts in the region — a culture that has to be carefully nurtured. As the Court will have seen from the documents annexed to Indonesia's Memorial, protests were reiterated each time a unilateral Malaysian activity took place.

20. I do not wish to dwell on these incidents further, Mr. President. But Indonesia feels very strongly that these kinds of activities are not relevant to the determination of sovereignty in this case, particularly bearing in mind that the dispute over the islands had already crystallized in 1969. It would be unfortunate indeed, particularly in today's volatile political climate, if States failed to draw the appropriate lessons from history, or were led to believe that it was in their legal interest to take unilateral steps to occupy territory, or exacerbate an already existing dispute. Against the backdrop of the pre-1967 conflict situation, Indonesia as the largest member of ASEAN committed

itself to rely exclusively on peaceful processes in the settlement of intra-regional differences. Indonesia remains faithful to that principle today.

Concluding remarks

21. Returning to a more positive note, it gives Indonesia pleasure to note that, despite these differences with our Malaysian neighbours, relations between the two countries remain excellent and that both countries have had the wisdom to submit their dispute jointly to your eminent jurisdiction.

22. Mr. President, Members of the Court. Counsel will be addressing some of the matters I have touched on in more detail. It may assist the Court, therefore, if I outline briefly the manner in which Indonesia will present its case.

23. Sir Arthur Watts will follow me and will provide a brief overview of Indonesia's case.

24. He will be followed first by Professor Soons and then by Professor Pellet who will set out the historical context of the case, including the circumstances in which the Dutch and British installed themselves in Borneo in the nineteenth century, their relationships with local rulers, and the events leading up to the conclusion of the decisive 1891 Anglo-Dutch Convention.

25. Sir Arthur Watts will then return to deal with the Convention in some detail.

26. After his presentation, Professor Soons will describe for the Court the various mutual elements of Dutch and British conduct following the conclusion of the 1891 Convention which confirmed Dutch sovereignty over the islands.

27. We will then turn to the arguments that Malaysia has advanced. Mr. Bundy will rebut Malaysia's argument based on an alleged chain of title running from Spain, to the United States, to Great Britain and thence to Malaysia. Then Professor Pellet will address the Malaysian argument based on alleged administration over the islands.

28. Ms Malintoppi will then address the Court on the map evidence that has been adduced by both Parties. And Professor Pellet will end Indonesia's first round presentations by recalling the key elements of Indonesian and Malaysian activity in more recent times which, once again, confirm Indonesia's sovereignty over both Sipadan and Ligitan.

29. Mr. President, I wish to thank the Court for its courtesy in listening to my presentation. I would be very grateful if you, Mr. President, would be good enough to call upon Sir Arthur Watts who will be the next speaker for Indonesia. I thank you very much.

The PRESIDENT: Thank you very much, Mr. Minister. Je donne maintenant la parole à sir Arthur Watts.

Sir Arthur WATTS: Thank you, Mr. President

Overview of the case

Mr. President and Members of the Court,

1. It is once again an honour for me to address the Court, and I do so today on behalf of the Republic of Indonesia. My purpose on this occasion is to give the Court a brief summary of what this case is all about, and also of the arguments which Indonesia will submit to the Court in the coming days.

2. This case concerns two very small islands, located just off the north-eastern coast of the large island of Borneo, and in the north-western portion of the Sulawesi Sea. On the screen now, and at tab 2 in the judges' folders, is a general map of Borneo and the surrounding area. The two small islands which this case is about are called Pulau Ligitan and Pulau Sipadan: "Pulau" simply means "island" in the local language. Their locations are being indicated to you now.

3. Also being indicated on the map are the mainland territories of Indonesia and Malaysia. The Indonesian mainland is part of the province of East Kalimantan; the Malaysian mainland is the State of Sabah. It can readily be understood, Mr. President and Members of the Court, how it is that there could be a dispute as to whether it is Indonesia or Malaysia which has sovereignty over those two islands located where they are.

4. Let me say just a little bit more about them. I said that they are very small. That is indeed true. Sipadan is about 0.13 km^2 in extent, and Ligitan is much the same size. They are so small that on many maps they do not appear at all.

5. On the screen now, and at tab 3 in the judges' folders, the Court can see a photograph of Sipadan, which gives a general idea of its size and vegetation. It is not associated with any adjoining land mass — it is in fact of volcanic origin, and represents the top of a sea-mountain

some 600-700 m above the basic sea floor, on whose peak a coral atoll has formed. The waters surrounding Sipadan are accordingly deep and drop rapidly to over 500 m.

6. The island, as the photograph shows, is densely wooded.

7. And now on the screen and at tab 4, the Court can see a similar photograph of Ligitan. Like Sipadan, Ligitan is not associated with any adjoining land mass.

8. It is, as the photograph shows, mostly sand. The island is close to a narrow sandbank, which is submerged at high tide but at low tide can be up to 1.2 m above sea level. The island of Ligitan itself, however, is permanently above sea level at high tide, and there are a few low bushes and trees on it.

9. Both islands were occasionally used by seasonal fishermen and turtle egg collectors, and they had their rough shelters there, but neither island sustained a permanent resident population. However, in recent years, and after this present dispute emerged between the Parties, a small privately-operated Malaysian tourist facility has been set up on Sipadan.

10. That, Mr. President and Members of the Court, sets the geographical scene for the dispute which the Parties have agreed to place before it. Now let me say briefly how this dispute has arisen, and explain the principal legal issues, as seen by Indonesia.

11. As to the first — the immediate origins of the dispute — I need add nothing to what Indonesia's Agent has just said. As he explained, the dispute emerged in 1969 during the course of maritime delimitation negotiations between Indonesia and Malaysia. Rather than delay their negotiations while this little local difficulty was resolved, the Parties came to what may be called a "standstill" arrangement in respect of the two islands, while continuing their negotiations on other matters.

12. Although the Parties actively sought to negotiate a solution to their difference, they were unsuccessful. They therefore decided to refer the question to this Court. They concluded a Special Agreement for this purpose in 1997, and it entered into force in 1998.

13. Underlying those immediate origins of the case now before the Court is, of course, a much longer story, going back many years. In fact, going back well into the nineteenth century, at a time when European States were expanding into this general area of south-east Asia.

14. In short, Indonesia's title in the area flows from the previous title of the Netherlands as Indonesia's colonial predecessor; and that Dutch title was confirmed by the provisions of a Convention concluded between the Netherlands and Great Britain in 1891. That Convention in turn settled a difference which had arisen as to the limits of the territories of the Sultan of Boeloengan (on the Dutch side) and those of the Sultan of Sulu (on the British side).

15. Setting out the story a little more fully, by the early years of the nineteenth century the three relevant local rulers were the Sultan of Brunei, the Sultan of Banjermasin, who was the overlord of the Sultan of Boeloengan, and the Sultan of Sulu. Their respective — and very approximate — areas of control are being indicated on the map now on the screen, and at tab 5 in the judges' folders. In fact, the interests of the Sultan of Brunei in the areas directly affected by the present case were peripheral, although Brunei's position will be referred to from time to time.

16. The main point at issue, however, was the area where the territorial interests of the Sultan of Boeloengan and the Sultan of Sulu met. This area is being shown on the map, and at tab 6 in the judges' folders. In fact, as Professor Pellet will show, the claims of the two Sultans overlapped: the Sultan of Sulu at times appeared to claim lands as far south as the "Sibuko River" — a landmark less certain than one might think, but possibly where it is being indicated on the map — while the Sultan of Boeloengan claimed lands — and, indeed, exercised territorial control — at least as far north as Batoe Tinagat and the Tawau River (both now being indicated).

17. There then appeared on the scene the British and Dutch, each seeking to extend its jurisdiction and control in the area. As Professor Soons will explain, the two European States established their authority over the domains of the Sultans in north-east Borneo — the Netherlands in respect of the Sultan of Boeloengan, Great Britain in respect of Sulu, through the establishment of the British North Borneo Company.

18. The territorial uncertainty which had existed previously as between the Sultan of Boeloengan and the Sultan of Sulu now became an issue between the Netherlands and Great Britain. As their activities in the area increased, the scope for friction also increased, and indeed at times tension became quite high. There was clearly going to be no agreement between those two States as to the previous limits of the Sultans' territorial authority, and as Professor P[illegible]et will

explain, it became essential for the two States to seek to settle the matter once and for all so that stability in the area could be maintained and sources of territorial friction avoided.

19. To that end the two States began to negotiate a treaty to fix the boundary between their respective possessions in the area. The outcome of that negotiation was a Convention concluded in 1891 which fixed the boundary between their possessions in North Borneo. The meaning and effect of this Convention is at the heart of the case now before the Court. If I may just briefly at this stage indicate the nature of the problem of interpretation which arises, it flows from the way in which the boundary is described in the Treaty.

20. The Parties first fixed a point on the coast of mainland Borneo as their starting point: it is being indicated now on the map on the screen, and at tab 7 in the judges' folders. From that point the boundary was described as following a line running westwards across the mainland of the island of Borneo: that part of the boundary is only of incidental importance to the present case.

21. Directly in issue, however, are the provisions of Article IV, prescribing the eastward prolongation of the boundary. As the Court will see, the starting point is screened from the open sea to the east by the island of Sebatik. Article IV thus provided that the boundary, beginning at the agreed starting point on the coast at the parallel 4° 10' N, "shall be continued eastward along that parallel, across the island of Sebittik".

22. It is Indonesia's submission — particularly given that the settlement embodied in the Convention was a compromise, and that the negotiating parties evidently intended to settle all their territorial differences in the region — that that provision of Article IV was intended to provide, and is properly to be interpreted as providing, a line of division between *all* Dutch and British territories in the area, and was intended to extend out to sea so far as necessary to separate Dutch and British offshore territories in the area. That agreed parallel of latitude, as is shown on the map on the screen, passes well to the north of Sipadan, and just to the north of Ligitan, thus attributing both islands to the Netherlands.

23. Indonesia's contention is supported by substantial arguments and evidence which will be examined in due course. At this introductory stage, however, Indonesia will just note a significant map which plays a major part in this case.

24. It is on the screen now, and at tab 8 in the judges' folders. It is a map which was submitted to the Dutch Parliament during the process leading to the ratification of the 1891 Convention. It shows, with a red line, the line agreed in the Convention. It is clear from this map that the Dutch Government, and Parliament, understood that the 1891 Convention established a line extending out to sea along the 4° 10' N parallel, and beyond the coast of the island of Sebatik — as stipulated in Article IV, the line "continued eastward along that parallel". The map was reported by the British Legation in The Hague back to the Foreign Office in London. The British Government made no protest whatsoever at the depiction of the line on the map, and must be taken to have acquiesced in it.

25. The 1891 Convention having established the 4°10'N line of latitude as the limit of Dutch and British possessions in the area, it is that line which, by virtue of Indonesia's and Malaysia's inheritance from their colonial predecessors, now serves as the boundary between Indonesian and Malaysian possessions. That treaty line, as already explained, attributed to the Netherlands sovereignty over the two islands now in dispute, since both lie to the south of the agreed line: they thus now belong to Indonesia.

26. That title, being treaty-based, has overriding legal effect in establishing Indonesia's present sovereignty over Ligitan and Sipadan.

27. But Indonesia does not rely solely on the Convention. There is both evidence of State practice since 1891 which confirms Indonesia's interpretation of the 1891 Convention, and admissions by Malaysia to the same effect.

28. In assessing the evidence of State practice in relation to Sipadan and Ligitan, two general points need to be borne in mind. First, the dispute now before the Court crystallised in 1969. For the purpose of admitting and assessing evidence of the exercise of State sovereignty, any conduct occurring after that date is to be disregarded: the dispute having by then arisen, later State conduct is inevitably tainted by the suspicion that it is self-serving, designed to strengthen, or even establish, that State's claim to sovereignty. Particularly noteworthy in this context is the fact that it was only after 1969 that a privately-operated Malaysian tourist facility was established — against Indonesian protest — on the island of Sipadan: as evidence of Malaysian sovereignty it is therefore to be disregarded, both because of its timing and because of its private nature.

29. The second general point to bear in mind is that it cannot be pretended by either Party that these two very small islands were at the centre of their concerns in the area: they were uninhabited and of very limited economic interest. Evidence of practice relating specifically to those islands is therefore in the nature of things not going to be as plentiful as it could be expected to be if they were the location of thriving and populous local communities. It is in these circumstances all the more important, therefore, to bear constantly in mind that Indonesia's title to the two islands is based on the terms of the 1891 Convention. A treaty-based title is entitled to overwhelming respect, particularly when it is opposed by only very limited State practice in a contrary sense, and even more so when that practice is itself contradictory.

30. That said, however, evidence is available of practice over the years which supports Indonesia's position. Thus, soon after the conclusion of the 1891 Convention, the Netherlands amended its local legal instrument defining the territories of the Sultan of Boeloengan. It did so in such a way as to acknowledge that the Convention did not just delimit the mainland territory of each Party but also that the 4° 10' N line allocated between the Parties islands on their respective sides of the line. The British Government was informed of this amendment, and raised no objection.

31. Again, in 1921 a Dutch naval vessel was policing the waters in the area. The vessel called at Sipadan, but it notably refrained from entering areas under British jurisdiction lying to the north of the Convention line of latitude.

32. Again too, oil concessions, as mentioned by the Agent, granted by Indonesia and Malaysia in the area have respected the agreed Convention line.

33. Starting with the so-called "Explanatory Memorandum map" to which I referred, and used by the Dutch Government and Parliament in ratifying the 1891 Convention, many maps have over the intervening years — including officially published British and Malaysian maps — also supported the existence of the Convention line extending out to sea to the east of the mainland of Borneo.

34. In the foregoing summary of the case I have concentrated on the relationship between, first, the Netherlands and Great Britain, and subsequently that between Indonesia and Malaysia. They are what this case is about. I must also note the alleged historical role played by the

relationships between the Sultan of Sulu, Spain and the United States. But at this stage, I do no more than note this matter: in Indonesia's submission it is a side issue, of no direct relevance to the main issues in this case. In particular, it serves in no way to deny Indonesia's title to Sipadan and Ligitan as derived through the 1891 Convention.

35. Mr. President and Members of the Court, that concludes my introductory summary statement of what the case now before the Court is all about, and what are the main elements of the argument which Indonesia will now put before you in greater detail. But one thing is already very clear. Indonesia has no need to try to develop complex and artificial arguments: Indonesia's argument is simple and straightforward. In essence it involves five simple points:

(i) first, in the nineteenth century the Sultan of Boeloengan had at least as good a claim to the now-disputed islands as, and indeed a better claim than, the Sultan of Sulu;

(ii) second, there is, however, no need for this Court to consider the merits of the rival claims of the Sultans, because the two Protecting States, the Netherlands and Great Britain, settled their territorial differences in the area by the 1891 Convention; in that Convention they adopted the eastward continuation of the parallel of 4° 10' N as the line dividing their possessions;

(iii) third, since both Sipadan and Ligitan lie to the south of that Convention line, it had the effect of attributing both islands to the Netherlands, and thus now to Indonesia;

(iv) fourth, up to the time when the dispute crystallized in 1969, the 4° 10' N treaty line has been respected in the practice of both Parties as the line separating their respective territorial possessions in the area; and

(v) fifth, the map evidence — including official maps published by Britain for the British North Borneo Company, and by Malaysia — shows that the 1891 Convention line extended to seaward of the mainland of Borneo, and thus left Sipadan and Ligitan on the Dutch, and now Indonesian, side of the line.

36. Mr. President, that concludes my remarks, may I now invite you to call upon Professor Soons to continue the presentation of Indonesia's case. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Sir Arthur. Je donne maintenant la parole au professeur Alfred Soons.

Mr. SOONS:

The historical context: the involvement of the Netherlands and Great Britain in North-East Borneo prior to the 1891 Anglo-Dutch Convention

Introduction

1. Mr. President, Members of the Court, it is a great honour for me to appear before you on behalf of the Government of the Republic of Indonesia.

2. For an adequate understanding of the 1891 Anglo-Dutch Convention, which allocated Pulau Sipadan and Pulau Ligitan to the Kingdom of the Netherlands, Indonesia considers it useful to provide a brief sketch of how the two States, Great Britain and the Netherlands, came to be involved in this territorial delimitation. This will be my task this morning.

3. I would, however, like to stress at the outset that the historical overview to be presented here is made from a European perspective. That is, of course, not because we think that that is the only valid perspective from which the historical events that will be dealt with in this presentation can be viewed. Rather, the perspective chosen is the inevitable result of the fact that we will have to deal in this case with the assessment, under the contemporaneous rules of international law, of acts by European States, both between themselves and in their dealings with the local rulers in this part of south-east Asia. As has become clear from the proceedings, the application of European concepts and the contemporaneous rules of international law presents difficulties in a number of instances. The facts as I will present them here are mainly concerned with the actions during the relevant period by the Dutch and British colonial powers; and that is of course only a very limited part of the history of nineteenth century north-east Borneo.

4. I will begin with a description of the situation in Borneo before the start of the European expansion towards north-east Borneo. Then I will discuss the Dutch actions undertaken for taking control of that area, to be followed by a presentation of the history of the British actions leading to the establishment of the State of North Borneo, on whose behalf the British Government acted when concluding the 1891 Convention with the Dutch.

The situation in Borneo before the start of European expansion towards north-eastern Borneo

5. Mr. President, Members of the Court, until the middle of the nineteenth century, north-eastern Borneo was only seen by the European colonial powers from a distance: from the seas around it, where ships passed on their trading voyages. These ships kept away from the coast as much as possible, because that was a dangerous area: there were many reefs, and pirates often operated in the coastal seas. Likewise, the local population saw the Europeans from a distance: only incidentally did they land on shore. There were no permanent European settlements, and the indigenous rulers ruled without European interference.

6. So it was only towards the middle of the nineteenth century that European powers began to show an active interest in the region. Until this period, their involvement with the island of Borneo as a whole had been limited: only the Dutch had had permanent settlements on the island, in the south and south-west. Some of these dated back to the end of the sixteenth century.

7. When the Europeans started to become interested in North and East Borneo, there were three major regional rulers whose authority was deemed to extend over parts of this area: the Sultans of Brunei, Sulu and Banjermasin. These three sultanates, and the centres of their governments, are shown on the map now projected on the screen (judges' folders, tab 9). The precise geographical extent of their authority, however, was not clear. And that was the result of their perception of the notion of territory, and the nature of authority in relation to territory, in combination with the system of shifting hierarchical relationships between the indigenous rulers in that region. This will be explained further later today by my colleague, Professor Pellet.

8. The Sultan of Brunei's authority covered the northern part of Borneo. It included mainly coastal areas, and upstream areas along rivers. Originally it included also the north-eastern part of Borneo (the region now called Sabah), but this appears to have been ceded to the Sultan of Sulu in the eighteenth century.

9. The realm of the Sultan of Sulu included the archipelago to the east of North Borneo, which is the south-westernmost part of the greater Philippine archipelago. But the Sultan also claimed authority over North East Borneo (Sabah), as a result of the grant to him by the Sultan of Brunei in the eighteenth century which I just mentioned.

10. Finally, the Sultan of Banjermasin's realm included the southern part of Borneo, the area where the first Dutch settlements had been established. However, he also claimed overlordship over huge parts of Borneo to the north of Banjermasin proper. He had ceded his possessions on the east coast of Borneo to the Dutch East India Company in 1787 (Memorial of Indonesia, paras. 3.7 and 4.56). When the Dutch East India Company was wound up a few years later, all its possessions were transferred to the Netherlands Government. During the Napoleonic wars, Dutch overseas territories, including the Dutch possessions in the East Indies, fell briefly into the hands of the British. Upon the return of peace, most of these territories were restored by Britain to the Netherlands by the Treaty of 13 August 1814 (Memorial of Indonesia, paras. 3.8 and 4.51). This Treaty, however, was not sufficient to reassure Britain that the Netherlands would not reintroduce in the area a régime of commercial monopoly as had existed under the rule of the Dutch East India Company.

11. Therefore, a new treaty was negotiated between Britain and the Netherlands, relating to the rights and interests of the two States in south-east Asia. This treaty, concluded in 1824, contained both commercial and territorial provisions. It established equality of commercial treatment between the parties. Under Article XII (the full text of which you will find in the judges' folders under tab 10), Great Britain agreed "that no British establishment shall be made on any of the islands south of the Straits of Singapore, nor any treaty concluded by British authority with the chiefs of those islands". As we will see, the exact meaning of this provision would become a source of contention between the Dutch and the British.

12. The lack of interest of European powers in Northern and Eastern Borneo changed when a British subject, James Brooke, who had started in 1841 as a private trader in Western Borneo, in 1844 was appointed as British Agent to Borneo. In 1846 Brooke made the Sultan of Brunei cede to Britain the island of Labuan, now shown on the map, situated just off the coast of Brunei near its capital city. It became a British colony and Brooke its first Governor. He also became the independent raja of Sarawak, the westernmost part of the Sultanate of Brunei, and subsequently occupied substantial areas to the north, as you can see on the map.

13. These actions of Great Britain in Borneo triggered a protest from the Dutch Government which viewed British actions as contrary to the Treaty of 1824. According to the Dutch, that treaty

had reserved the island of Borneo to them. The British maintained the position that nothing in the 1824 Treaty prevented either party from establishing relations with the local rulers of Borneo and that the limitation of British rights contained in the Treaty, which applied to islands lying south of the straits of Singapore, did not encompass the island of Borneo.

14. The Dutch Government's position was that the island of Borneo was not mentioned in the 1824 Treaty because the treaty was based on the principle that the Dutch and British should not jointly occupy the same territory. Given that the British were not present in Borneo in 1824, the Dutch concluded that their future presence was precluded. The British Government, however, took the position that nothing contained in the Treaty of 1824 precluded the formation of British settlements in that part of Borneo in which the Netherlands did not possess acknowledged rights. In internal debates in the Netherlands throughout the second part of the nineteenth century the 1824 Treaty was frequently invoked to oppose British activities in Northern Borneo, but the Dutch Government eventually did not press the issue against the British. Consequently, the Dutch Government chose, as we shall see, not to oppose the establishment by a private British enterprise of a presence in northern Borneo (Memorial of Indonesia, paras. 3.14-3.17).

15. Shortly after Brooke's successful activities on Borneo's north-west coast, another Englishman, Erskine Murray, attempted to settle on the east coast of Borneo. This was in 1843-1844. The attempt failed: Murray was murdered. But the Dutch were quick to react and began to exercise actual control over the eastern coast areas. Mr. President, Members of the Court, the scramble for North East Borneo had begun.

16. On the Dutch part, there were two main motives for this scramble. The first concerned the wish to secure the areas against intervention by other Western powers, in this way preventing other powers to take control of the territory. The second motive, of course, involved the pursuing of economic interests: the exploitation of the territory's natural resources. The main natural resources private companies were looking for were coal, timber and later also oil.

17. Mr. President, Members of the Court, before I continue with describing the Dutch actions to gain actual control over these areas I should explain that the preferred way for the Dutch to acquire colonial territory in south-east Asia, both before and throughout this period, was to pressure the local rulers into concluding agreements (so-called "contracts") whereby they either accepted

Dutch suzerainty, or ceded their territories to the Dutch Government. These local rulers would often get their territories then returned as fiefs. Only exceptionally were the territories annexed after conquest, but this did not happen in the coastal areas of north-eastern Borneo.

The Dutch taking control of north-eastern Borneo

18. I now turn to the Dutch actions undertaken for taking control of north-eastern Borneo. As I mentioned earlier, the Sultan of Banjermasin in the south claimed supreme authority over the rulers on the east coast of Borneo. His cession of these territories to the Dutch East Indies Company in the eighteenth century was renewed in contracts with the new Netherlands East Indies Government in 1817, 1823 and 1826 (see Memorial of Indonesia, paras. 4.57-4.58). These contracts specifically listed the areas of Pasir, Koetei and Berou. However, the Dutch Government soon concluded that this pretended authority of the Sultan of Banjermasin over Borneo's east coast was at most nominal, and it began direct relationships with the local rulers in order to confirm and demonstrate its authority. To the immediate north of Banjermasin proper these rulers were the Sultans of Pasir and Kutei. Their areas are shown on the map now on the screen. North of these territories was the so-called realm of Berou. This realm of Berou, also shown on the map, originally consisted of three separate entities: Sambalioeng, Goenoengtaboer and Boeloengan. In 1834 the Dutch transferred part of the territory of Berou to the ruler of Goenoengtaboer in fief. Boeloengan was not included, but its ruler for the first time submitted himself directly to the authority of the Netherlands East Indies Government in the same year (Memorial of Indonesia, Vol. 2, Ann. 8). And this indicates that he had, by then, no hierarchical relationship with the ruler of Goenoengtaboer and that his territory was, at the time, regarded as completely separate from Berou.

19. Also during this period, the territory called Tidoeng, consisting of six districts located to the north of Boeloengan proper, had become subject to the ruler of Boeloengan. That area, shown on the map, was henceforth regarded by the Dutch as a dependency of Boeloengan and part of its territory. You will find this map in the judges' folders, under tab 11.

20. In 1844 the States of Sambalioeng, Goenoengtaboer and Boeloengan (formerly constituting Berou) were each recognized as separate realms by the Netherlands Indies Government. Their chiefs were officially granted the title of Sultan.

21. In 1850 the Netherlands East Indies Government concluded contracts with the sultans of each of the three realms in which the respective territories of the realms were given to the sultans as fiefs (Memorial of Indonesia, para. 4.62). The contract with the Sultan of Boeloengan was concluded on 12 November 1850; you will find it in your folders under tab 12.

22. The contract with the Sultan of Boeloengan included a description of the geographical area under his control. Article 2 of this contract is now projected on the screen; it reads as follows, of course in English translation:

> "The territory of Boeloengan is located within the following boundaries: with Goenoeng-Teboer: from the seashore landwards, the Karangtiegau River from its mouth up to its origin; in addition, the Batoe Beoekkier and Mount Palpakh;
>
> with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River.
>
> The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, with the small islands belonging thereto.
>
> This delimitation is established provisionally, and shall be completely examined and determined again."

23. Three elements in this territorial definition deserve special attention here. The first is the northern limit of the territory, defined as the Cape Batoe Tinagat and the river Tawau. These locations are shown on the map projected on the screen, which is in the judges' folders under tab 13. The territorial definition thus recognized that Boeloengan bordered on possessions on the mainland of Borneo belonging to the Sultan of Sulu.

24. The second element deserving attention is the mentioning of islands in the definition. The three largest ones are mentioned by name: Tarakan, Nenoekan and Sibetik, while all others are merely referred to in a generic sense: the "small islands belonging thereto". But this shows clearly that the Sultan of Boeloengan had maritime possessions as well, apart from part of the mainland of Borneo. In this connection it should be emphasized that the population of the Sultanate of Boeloengan was quite varied and consisted of Dayak in the upstream regions of the Tidoeng lands, and Malay and Bugis in the coastal regions. The Bugis, originally from south Sulawesi but fully

assimilated in Boeloengan society, formed the seafaring component of the population. This is acknowledged by the historian Vincent Houben, whose expert opinion was attached to Malaysia's Counter-Memorial. Contrary to what Malaysia seems to conclude from his report, Boeloengan too was engaged in sea trade and thus had a maritime dimension.

25. The third element of the territorial definition deserving attention is the safeguarding clause at the end: the definition was to be regarded as provisional. This showed the uncertainty that the Dutch originally recognized existed with respect to the exact limits of the territory.

26. According to some, the area subject to the Sultan of Boeloengan extended even much further north than the Tawau River (Memorial of Indonesia, para. 5.5; Reply of Indonesia, para. 5.14 and Ann. 1). I refer to the article by H. von Dewall, published in 1855, an excerpt of which is included in Indonesia's Reply as Annex 1. He describes that, in 1849, there was a sentiment to fix the northernmost point of the Dutch possessions on the east coast of Borneo at 5° 40' N latitude (the Bay of Sandakan) or even at 6° 25' N latitude. The Dutch Government eventually decided not to recognize such claims, as I just pointed out, but this highlights again the uncertainty about the borders in this region.

27. In 1878 a new contract was concluded with the Sultan of Boeloengan. It contained the same territorial definition as the one of 1850, except for the deletion of the reference to the provisional nature of the definition. You find a copy of it, in English translation, in your folders under tab 14 (Memorial of Indonesia, Vol. 2, Ann. 19).

28. The limits of the Sultanate of Boeloengan were subsequently reflected in the territorial definitions of the administrative divisions of Dutch Borneo. The Decree of 2 February 1877, which divided the Residency of Southern and Eastern Borneo into six divisions, named the sixth and northernmost division as "Koetei and East Coast of Borneo". According to Article 3 of this Decree, this division included "the feudal states of Boeloengan (to which belong the Tidoeng countries and the islands of Terrakan, Nenoekan and Sebittikh with the smaller islands belonging thereto) . . ." (Memorial of Indonesia, para. 4.67).

29. The Dutch presence in Boeloengan in this period was certainly not only nominal. The Dutch were occasionally active, both on the ground and in particular at sea off its coasts. For example, already in 1849 an expedition was sent to the inland areas and Dutch flags were

distributed there to the local chiefs, as can be seen from the document included in the judges' folders under tab 15 (Memorial of Indonesia, Vol. 3, Ann. 57).

30. At sea, the Dutch navy patrolled the coastal areas because of the need to protect the population of the Dutch territory against threats of robbery, and coastal shipping against threats of piracy. As an example of Dutch presence it is worth calling your attention to the activities of HNLMS *Admiraal Van Kinsbergen* during the period 1875-1877, which were mentioned in Indonesia's Counter-Memorial, paragraph 3.67. The ship's log book contains an entry on 10 June 1876 which refers explicitly to cruising around the island of Sipadan, and even landing armed sloops on the island of Mabul, which is located eight miles to the north of Sipadan. The fact that the commander of the Dutch warship considered himself entitled to visit that island illustrates that the Dutch regarded this area as belonging to Boeloengan. But the main thing is that the Dutch were indeed physically present in the area. Malaysia, in its Reply (paras. 3.21-3.23), dismisses the importance of the presence of Dutch warships in the area for the purpose of establishing the exercise of territorial sovereignty. However, the important point here is that the Dutch naval presence throughout this period proves the position of the Dutch Government that their sovereignty, through the Sultan of Boeloengan, extended at least up to this area.

31. Having mentioned the *Admiraal Van Kinsbergen*, I should quickly deal with the alleged mistranslation raised by Malaysia in paragraph 3.23 of its Reply. Malaysia refers to Annex 12 of our Counter-Memorial, and implies that we suggested that the heading of this Annex, reading "Admiraal van Kinsbergen on patrol off the coast of Boeloengan" was the translation of the words filled in at the top of the relevant page of the ship's log book, reading in Dutch: *"Admiraal Van Kinsbergen in Solo zee, van Sesajab naar Kobang"*. That, of course, is not the case. The heading of the Annex was not a translation, and we did not suggest that. It was meant to describe what the extract was about. It was about the activities of the warship in this particular area. The *Admiraal Van Kinsbergen* was at that time the warship stationed at Tarakan, to guard the Dutch north-east Borneo coast. The log book page for this day mentions steaming from Sesajab to Kobang. Since the Sesajab River is located in Boeloengan, the *Van Kinsbergen* was obviously off the coast of Boeloengan. So there was nothing wrong with the heading we gave this Annex!

32. There are further examples of Dutch warships present in the area, as witnessed and described by the British. We refer to these in our Counter-Memorial, in paragraph 3.68, but I will refrain from repeating them here.

33. The Dutch flag was permanently raised at Batoe Tinagat in 1879 when also a Dutch official was stationed there and a Dutch warship patrolling the border area operated out of Tarakan. This enabled the Dutch to react quickly, and assert their sovereignty, when in September 1883 Treacher, the first Governor of North Borneo, sought to assert his territorial rights by sailing in his official launch to the south bank of the Sibuko River where he hoisted the North Borneo flag, fired a *feu de joie*, hauled the flag down again, carved a symbol on an adjacent tree, and sailed away. The Dutch of course immediately chopped down his marker tree (Memorial of Indonesia, para. 5.4).

34. This was the situation on the Dutch side during the period that in north-eastern Borneo British settlement began.

The origins of the State of North Borneo

35. Mr. President, Members of the Court, as you noticed I just started to refer to the British in my exposé. I will now turn to describing the British side of the scramble for north east Borneo, which resulted first in the establishment of the British North Borneo Company (BNBC) and then the British Protected State of North Borneo. By the mid-nineteenth century, the British Government, having become increasingly concerned about piracy in north Borneo, sought to find ways to protect British sea trade. And this was the main reason why the colony on the island of Labuan was established: it provided a coaling station for ships of the Royal Navy. Meanwhile, in 1850 the United States established a formal presence in the area with the signature of a treaty with the Sultan of Brunei which provided for freedom of trade between the two countries.

36. In 1865 the United States Consul for Borneo, Mr. Moses, obtained from the Sultan of Brunei a concession which embraced most of the territory later to be administered by the BNBC. The southern limit of his concession was at 5° N latitude. Mr. Moses subsequently ceded the concession to a company called the American Trading Company. This company tried to convince the United States Government to take over the concession. When this proved unsuccessful, new

purchasers were found in Baron Von Overbeck and Alfred and Edward Dent. Von Overbeck was the Consul-General of Austria-Hungary in Hong Kong. The Dent brothers were commercial agents who had founded the British company Dent & Co., operating out of London and Shanghai. On 29 December 1877 the Sultan of Brunei agreed to issue three separate grants to the Dent brothers and Von Overbeck encompassing a large area of North Borneo in exchange for a total annual payment of $15,000 (Memorial of Indonesia, Vol. 2, Ann. 16).

37. Since this grant included a portion of territory along the east coast of Sabah which was also claimed by the Sultan of Sulu, Baron von Overbeck deemed it prudent to enter into a separate agreement with that ruler as well. On 22 January 1878 the Sultan of Sulu agreed to transfer to Dent and Von Overbeck for an annual payment of $5,000 a concession. You will find a copy in the judges' folders under tab 16 (Memorial of Indonesia, Vol. 2, Ann. 17). The territory of the concession is defined as follows:

> "all the territories and lands being tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the west coast to Maludu Bay, and extending along the whole east coast as far as the Sibuco River in the south, comprising all the provinces bordering on Maludu Bay, also the States of Pietan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mamiang, and all the other territories and states to the southward thereof, bordering on Darvel Bay and as far as the Sibuco River, with all the islands belonging thereto within three marine leagues of the coast."

38. The places mentioned in this definition can be seen on the map now shown on the screen, included under tab 17 in the judges' folders.

39. The provision I just quoted from the concession, which I am sure will be referred to more often during these proceedings, refers to the "Sibuco River" as the southern limit of the concession area. The exact identity of this geographical feature remained uncertain; this will be explained more fully by Professor Pellet. Clearly, if this was meant to be the Sibuko river located in Boeloengan, identified on the map, there was an overlap with Dutch claimed territory, and this was then bound to become a source of dispute with the Dutch.

40. Later in 1878 Dent and Von Overbeck established presence in their newly acquired concession area by appointing three residents, two on the west coast and one on the east coast, at Sandakhan Bay; Sandakan is also shown on the map.

41. The Dent brothers then applied to the British Government for a Royal Charter for their commercial undertaking, seeking in this way to ensure the support of the British Government. This application triggered protests from the Dutch Government which sought, and obtained, reassurances from Britain that it did not advance any claims of sovereignty over the area. Pressed by Count Van Bylandt, the Dutch envoy in London, the British Foreign Secretary, Lord Salisbury, replied that his Government respected the rights of the Sultans of Sulu and Brunei and did not intend to do anything in derogation of those rights (Memorial of Indonesia, para. 3.36).

42. At this point I should note that Spain also claimed the possessions of the Sultan of Sulu in North Borneo following a treaty concluded in 1851 with that Sultan. The British rejected Spanish claims to Sulu and its dependencies as "merely a nominal claim over a certain undetermined part of Borneo". However, in 1885 Great Britain, Germany and Spain signed a Protocol pursuant to which Britain and Germany recognized Spanish sovereignty over the Sulu archipelago, in return for a renunciation by Spain of any claim over north-eastern Borneo. Mr. Bundy will deal with the significance of these arrangements for our case this afternoon.

43. In November 1881 the British Government granted a Royal Charter to the company. You will find a copy of the text in the judges' folders under tab 18. In May 1882 the chartered company was officially formed under the name of British North Borneo Company. As a result of this Royal Charter, the British Government officially was the competent authority to deal with any differences between the company and the sultans as well as foreign powers. The British Government engaged henceforth in direct dealings with the Dutch concerning territorial differences between the BNBC and the Dutch Government.

44. Then, on 12 May 1888 the British Government entered into an agreement with the BNBC to establish the State of North Borneo. The agreement, which you find in your folders under tab 19, made the State of North Borneo a British Protected State, with the British Government assuming responsibility for its relations with other States. As a consequence, the British Government did now accept claims of sovereignty over the area by the State of North Borneo, and would henceforth be involved in any settlement of territorial disputes between the Netherlands and the State of North Borneo. As mentioned before, as a result of the territorial definitions contained in the Dutch contracts with the Sultan of Boeloengan and the grant to Dent

and Von Overbeck by the Sultan of Sulu, in particular the mentioning of the Sibuko River as the southern limit, there were overlapping claims. These needed to be settled now between the Governments of the Netherlands and Great Britain. The negotiations started in 1888, and a Joint Commission was formed in 1889. Professor Pellet will deal with this.

45. Mr. President, Members of the Court, this brings me to the end of this historical introduction. I thank you for your patience and attention. I would ask you, Mr. President, to call on my colleague Professor Pellet, who will continue on behalf of Indonesia. But perhaps it is an appropriate moment to have a break. Thank you.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La séance est suspendue pour une dizaine de minutes.

L'audience est suspendue de 11 h 20 à 11 h 30.

Le PRESIDENT : Veuillez-vous asseoir. La séance est reprise et je donne maintenant la parole au professeur Alain Pellet.

M. PELLET :

LE CONTEXTE ET L'OBJET DE LA CONVENTION DE 1891

Monsieur le président, Madame et Messieurs de la Cour,

1. J'ai l'honneur de me présenter à nouveau devant la Cour, que je suis heureux de retrouver au grand complet, au nom de l'Indonésie. J'exposerai, ce matin, le contexte immédiat et l'objet de la convention de 1891 au sujet desquels la Malaisie déforme considérablement la thèse indonésienne et commet ce que je n'hésiterai pas à qualifier de contre-sens juridique.

2. Une remarque préliminaire cependant. Dans sa première «Instruction de procédure», la Cour fait part de son souhait de «décourager la pratique du dépôt simultané des pièces de procédure dans les affaires soumises par voie de compromis»; la présente affaire montre combien ce souhait est fondé. Comme mes collègues, je me trouve en effet dans la situation embarrassante de devoir répondre à l'argumentation développée par la Malaisie dans sa réplique, alors même que nous y

avons déjà largement répondu par avance dans notre propre réplique, déposée le même jour. Ceci est particulièrement frappant en ce qui concerne le thème de ma plaidoirie de ce matin.

3. A la page 2 de sa réplique, la Malaisie affirme que la thèse de l'Indonésie repose sur trois propositions et que, *«[i]f Indonesia fails to establish any one of these three propositions, its case fails altogether»* (par. 1.4). Selon la première de ces propositions, l'Indonésie devrait prouver *«that the islands were part of the Sultanate of Bulungan under Dutch sovereignty» (ibid.)*. Pour sa part, l'Indonésie a établi, en particulier aux pages 9 à 15 de sa réplique (par. 1.4-1.23), que cette affirmation malaisienne est totalement infondée juridiquement : en procédant à une allocation de territoires coloniaux entre les Pays-Bas et la Grande-Bretagne, la convention de 1891 a enlevé, au point de vue juridique, toute pertinence à la question de savoir qui du sultan de Boeloengan ou de celui de Sulu exerçait sa souveraineté sur les îles, objet du présent différend. Si elles relevaient de Sulu, elles sont passées aux Pays-Bas du fait de la convention; si elles appartenaient à Boeloengan, elles sont demeurées néerlandaises.

4. Selon l'Indonésie, c'est cette seconde hypothèse qui est la bonne et j'y reviendrai brièvement. Mais ceci n'a d'intérêt qu'historique : en droit, peu importe; l'impérialisme colonial se souciait fort peu de l'appartenance des territoires que les puissances européennes se partageaient. Tout au plus celles-ci tentaient-elles de tirer parti, dans leurs négociations *inter se*, des accords qu'elles avaient pu passer avec les chefs locaux. Et tant la Grande-Bretagne que les Pays-Bas, n'ont pas manqué de le faire durant les travaux préparatoires de la convention de 1891. L'entreprise était cependant d'autant plus aléatoire que les sultans de la région entretenaient avec la notion de territoire un rapport fort différent de celui qui caractérise l'Etat au sens européen du mot. Par voie de conséquence, les limites de leur emprise territoriale étaient incertaines et leurs prétentions se chevauchaient largement (I).

5. Je me propose, Monsieur le président, de revenir brièvement sur cette double proposition avant de montrer ensuite :

— que la présence de Boeloengan et des Pays-Bas immédiatement au nord du parallèle 4° 10' nord avant 1891 était avérée alors que celle de la Grande-Bretagne ou de Sulu au sud de ce parallèle était, pour sa part, inexistante (II) et

— que, si incertitudes il y avait, la Grande-Bretagne et les Pays-Bas, en concluant la convention de 1891, ont précisément entendu y mettre fin (III).

I. Les rapports au territoire des sultans de la région au moment de la colonisation

6. L'Indonésie a montré dans son mémoire (p. 38-44) qu'à la fin du XIX^e siècle les sultans musulmans de la région, que ce soit dans la péninsule malaise ou dans les archipels indonésien ou philippin, entretenaient avec la notion de territoire des rapports complexes, fort différents de ceux qui caractérisent les Etats contemporains, dont le territoire est à la fois un élément constitutif et un objet de compétences, plénières et exclusives, se traduisant par ce que l'on appelle communément la «souveraineté territoriale».

7. La Malaisie n'a pas pris la peine de réfuter explicitement les explications que nous avons données à cet égard. Mais il est frappant que, dans les trois volumes de ses écritures, elle s'obstine à présenter le territoire du Sultanat de Sulu dans les années 1850 ou 1880 comme celui d'un Etat européen. La Malaisie, qui n'hésite pas à utiliser le mot *«sovereignty»* (voir par exemple le mémoire de la Malaisie, p. 29, par. 5.1), ne s'est pas donné le mal de répondre au mémoire indonésien qui, je viens de le rappeler, a pris soin de mettre en évidence la différence existant entre les conceptions territoriales prévalant alors dans la région et la notion de souveraineté telle qu'elle est généralement conçue dans le cadre du droit international contemporain. Toutefois, elle recourt souvent à un vocabulaire plus inhabituel qui témoigne sans doute d'un certain embarras. Elle évoque les *«dependencies of the Sultanate of Sulu»* (cf. mémoire de la Malaisie, p. 29-36, par. 5.3-5.8), *its «authority»* (p. 34, par. 5.8), *«its possessions»* (cf. contre-mémoire de la Malaisie, p. 54, par. 3.7) *or «dominions»* (mémoire de la Malaisie, p. 1, par. 1.3 (1) ou p. 11, par. 2.10), *the «allegiance of the local people»* (contre-mémoire de la Malaisie, p. 55, par. 3.9 ou réplique de la malaisie, p. 9-11, par. 2.6-2.11), etc.

8. Monsieur le président, je comprends l'embarras dont témoigne le vocabulaire utilisé par la Malaisie car, comme nous l'avons montré, l'analogie avec la notion de souveraineté territoriale qui nous est familière est, pour le moins, hasardeuse.

9. Il me paraît utile, à cet égard, de reprendre la démonstration de notre mémoire et je vous prie, Madame et Messieurs les juges, de bien vouloir vous y reporter. Il me suffira d'en rappeler les principales conclusions :

10. 1) Les liens personnels étaient plus forts que les liens proprement territoriaux; du reste, la notion de souveraineté territoriale, dans le sens largement dominant aujourd'hui en droit international, est étrangère à la pensée musulmane. Comme l'explique Majid Kadduri,

> «*the adoption by Muslim States of the principle of territorial sovereignty led eventually to the transformation of the concept of the Siyar [that is the law ruling external relations of Islam] from a law regulating the conduct of a universal State to that of a law recognizing territorial segregation. This gave rise to a set of complex problems stemming from the concept of territorial sovereignty, such as frontier and boundary questions*» («International Law, Islamic», *Encyclopaedia of Public International Law*, 6, p. 232; voir aussi, *Sahara occidental*, avis consultatif, *C.I.J. Recueil 1975*, p. 42, par. 88 ou la sentence arbitrale du 9 octobre 1998, *Erithrea/Yemen (first stage — Territorial Sovereignty and Scope of the Dispute)*, p. 35, par. 130).

Comme l'a relevé la Cour dans l'affaire du *Sahara occidental*, dans le monde musulman, «les liens politiques d'allégeance à un souverain ont souvent été un élément essentiel de la texture de l'Etat» (*C.I.J. Recueil 1975*, p. 44, par. 95); il en allait de même dans la région qui nous occupe et cette caractéristique était encore affermie par l'influence préislamique qui continuait de s'y faire sentir (cf. Cesar Adib Majul, «Political and Historical Notes on the Old Sulu Sultanate», *Journal of the Malaysian of the Royal Asiatic Society*, vol. XXXVIII, Singapour, 1965, p. 27; voir aussi N. Tarling, *Sulu and Sabah — A Study of British Policy Towards the Philippines and North Borneo from the Late Eighteenth Century*, OUP, Kuala-Lumpur, 1978, p. 2).

11. 2) Il résultait notamment de ceci qu'il était impossible de parler de «frontières» au sens contemporain du mot; comme l'indiquent fermement les meilleurs spécialistes de ces questions à propos de Sulu : «*Strictly speaking, the sultanate of Sulu was a multi-ethnic group state which did not have any recognised boundaries*» (T. M. Kiefer, cité par N. Tarling, *op. cit.*, p. 5; voir aussi C. Sather, *The Bajau Laut : Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, OUP, Kuala-Lumpur, 1997, p. 38 ou D. E. Brown, *Brunei : The Structure and History of a Bornean Malay Sultanate*, Star Press, Brunei, 1970, p. 76-77).

12. 3) L'emprise territoriale et administrative du sultan était, si je peux dire, «radiale»; elle s'affaiblissait à mesure que l'on s'éloignait du lieu où il était établi; et, qu'il s'agisse de Sulu ou de

Boeloengan, la zone qui nous intéresse est, en tout état de cause, une marche, fort éloignée du centre où résidait le sultan.

13. 4) Sur Bornéo même, la pénétration humaine était limitée à la proximité immédiate des rivières : le pouvoir s'y exerçait en fonction de l'implantation humaine à l'exclusion de la jungle environnante qui était impénétrable (cf. D. E. Brown, *op. cit.*, p. 76-77 et «The Social Structure of Nineteenth Century Brunei», *The Brunei Museum Journal*, vol. 1, n° 1, 1969, p. 172; voir aussi N. Tarling, *op. cit.*, p. 4 ou W. H. Treacher, «British Borneo : Sketches of Brunai, Labuan and North Borneo», *Journal of the Straits Branch of the Royal Asiatic Society*, p. 48 — voir contre-mémoire de la Malaisie, vol. 2, annexe 11 ou le memorandum de sir E. Hertslet du 9 janvier 1889, mémoire de l'Indonésie, vol. 2, annexe 38, et la déclaration néerlandaise du 18 juillet 1889, vol. 3, annexe 58).

14. 5) Il résulte aussi de cette organisation du pouvoir politique que les îles n'avaient de réelle pertinence pour la définition des sultanats locaux que si elles étaient habitées de façon permanente; faute de quoi, on se trouve confronté au problème qu'a rencontré le Tribunal arbitral dans l'affaire *Erythrée/Yémen*. Dans sa première sentence, celle du 9 octobre 1998, le Tribunal a relevé que les prétentions du Yémen se heurtaient à l'obstacle

> *«of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen»* (p. 118, par. 446).

Encore faut-il noter qu'en l'espèce ni l'Indonésie ni la Malaisie n'ont pu donner la moindre preuve que les îles en litige étaient utilisées *avant* la période coloniale et il ne suffit certainement pas d'affirmer, comme le fait la Partie malaisienne dans sa réplique, que les îles qu'elle revendique étaient «à l'évidence partie intégrante de la structure administrative de la région» (*«the administrative structure of the region of which the islands are evidently a part»* (p. 68, par. 5.7) pour qu'il en soit ainsi.

15. Ceci étant, il semble bien que les sultans, celui de Boeloengan comme celui de Brunéi ou de Sulu, considéraient que toutes les îles se trouvant dans les parages des territoires avec lesquels ils avaient des liens leur appartenaient, comme le montrent les nombreux exemples de traités de cession donnés dans le mémoire indonésien (p. 50-51, par. 4.39-4.42) — étant entendu qu'en

général ces traités se bornent à mentionner les territoires cédés ou concédés et les «îles ou îlots adjacents» sans autre précision. Ceci, d'une part, ne témoigne pas d'un intérêt particulièrement vif et, d'autre part, confirme que les sultans de la région ne raisonnaient pas en termes de délimitation territoriale précise.

16. La conséquence de tout ceci est qu'il est vain de vouloir à toute force substituer les conceptions aujourd'hui dominantes de l'organisation spatiale et territoriale du pouvoir à celles qui régnaient alors dans la région comme le fait la Malaisie. Les chefs locaux exerçaient une autorité, d'ailleurs variable et diversifiée, sur des populations dont les liens d'allégeance pouvaient être multiples. Il en résultait des incertitudes et des chevauchements dans l'étendue territoriale de cette autorité.

17. Un exemple particulièrement net de ce phénomène est constitué par les *deux* concessions accordées à Dent et Overbeck respectivement par le sultan de Brunéi en 1877 et celui de Sulu en 1878 pour le même immense territoire. Il n'est pas inutile de rappeler à cet égard que c'est avec celui de Brunéi que les deux «hommes d'affaires» (ou «aventuriers» ?), Dent et Overbeck, ont d'abord traité; puis ils se sont adressés à celui de Sulu qui revendiquait des portions de ces mêmes territoires, sans que les limites précises non seulement des territoires, mais même des prétentions de l'un et de l'autre, fussent claires (cf. mémoire de l'Indonésie, vol. 2, annexes 16 et 17).

18. Comme l'avait relevé sir James Brooke, premier gouverneur britannique de Labuan dès 1849 :

> *«The geography of Borneo is so imperfect, and the boundary-lines of petty States so irregular, so vague, and of so little consequence to the native Rulers, that it can be scarcely maintained ... 'that the general knowledge obtained of the geographical and political affairs of Borneo afford an opportunity of fixing the circumscription of a territorial division of the island'.»* (Cité par sir Edward Hertslet *in* a «Memorandum on the Dutch Frontier on the North-East Coast of Borneo», 20 juin 1882, mémoire de l'Indonésie, vol. 2, annexe 28.)

L'idée est reprise à son compte par sir Edward Hertslet en 1882 *(ibid.)*, qui écrit par ailleurs : *«Native rulers really know nothing of Boundary Lines»* (notes manuscrites préparatoires à la réunion de la commission anglo-néerlandaise, non datées, mémoire de l'Indonésie, vol. 2, annexe 56); et on la retrouve exprimée avec force dans un mémorandum du Foreign Office

britannique signé «H. C. E.» de 1879 relatif aux concessions Dent/Overbeck : «*The question of the Sulu territory in Borneo is a very complicated one. The limits of the territory are very uncertain, and the exact nature of the authority exercised over it by the Sultan of Sulu is equally so.*» (Mémoire de l'Indonésie, vol. 2, annexe 20.) Le mémoire indonésien donne d'autres exemples de la perplexité des Européens et des Américains face à l'incertitude des frontières et à l'imbrication des territoires dans cette région du monde.

19. Ces considérations sont superbement ignorées par la Malaisie : pour elle, le sultan de Sulu exerçait sa souveraineté territoriale dans le cadre de frontières bien définies, y compris sur les îles qui font l'objet du différend et, dont, par une suite historique compliquée, la Malaisie a hérité.

20. Il est aisé de comprendre pourquoi la Partie malaisienne adopte cette présentation purement européo-centriste et anachronique : contrairement à ce qui est le cas pour l'Indonésie, la Malaisie a absolument besoin d'établir l'existence de ce titre originel, faute de quoi, toute sa thèse s'écroule.

21. Il est vrai que nos contradicteurs ne se sont, dans leurs écritures, pas montrés d'une très grande constance en ce qui concerne la «chaîne de titres» sur laquelle ils se fondent. Tantôt en effet, ils expliquent que la BNBC *(British North Borneo Company)* administrait Ligitan et Sipadan sur le fondement de la concession de 1878, que ces droits sont ensuite passés à la Grande-Bretagne, puis, par succession, à la Malaisie (mémoire de la Malaisie, p. 2-3, par. 2.1-2.2), sans que, du reste, on sache très bien s'ils estiment que le sultan de Sulu avait ou non cédé les deux îles à la BNBC (cf. contre-mémoire de la Malaisie, par. 3.29, p. 69). Tantôt — et cette thèse semble maintenant avoir leur préférence (cf. réplique de l'Indonésie, p. 3, par. 10) —, nos contradicteurs considèrent que les îles ont été, en 1878, cédées par le sultan de Sulu à l'Espagne, qui les a, à son tour, en 1900, abandonnées aux Etats-Unis, qui les ont eux-mêmes, par la convention de 1930, remises à la Grande-Bretagne dont la Malaisie est le successeur (voir contre-mémoire de la Malaisie, p. 5, par. 1.7; réplique de la Malaisie, p. 1-2, par. 1.3). Ces deux thèses sont parfaitement incompatibles, mais peu importe en ce qui nous concerne pour l'instant (M. Bundy reviendra cette après-midi plus longuement sur la seconde, puisqu'aussi bien la Malaisie semble avoir abandonné la première) : dans les deux cas, il *faut* que Ligitan et Sipadan aient, à l'origine, appartenu au sultan de Sulu;

sinon, quel que soit le détour choisi, ces deux îles ne sont pas (ne peuvent pas être) malaisiennes aujourd'hui.

22. En revanche, comme je l'ai dit tout à l'heure, Monsieur le président, ce titre originel ne présente pas d'importance décisive pour la thèse de l'Indonésie qui, comme l'a rappelé mon éminent ami sir Arthur Watts, est infiniment moins tortueuse : Ligitan et Sipadan se trouvent au sud de la limite entre les territoires alloués respectivement à la Grande-Bretagne et aux Pays-Bas par la convention de 1891 et ont relevé par conséquent de ces derniers, quelle qu'ait été leur situation juridique antérieure, avant de passer sous la souveraineté de l'Indonésie après son indépendance.

23. En droit, peu importe l'appartenance des îles contestées avant 1891 puisque la convention conclue à cette date a réglé le problème. En tout état de cause, même si cette question de l'appartenance des îles avant 1891 avait de l'importance *(quod non)*, la probabilité selon laquelle elles se trouvaient dans la mouvance territoriale de Boeloengan est infiniment plus forte que leur appartenance à Sulu à laquelle aucun élément des plaidoiries écrites de la Malaisie ni de la documentation dont nous disposons ne donne la moindre vraisemblance.

II. La présence de Boeloengan et des Pays-Bas au nord, et l'absence de Sulu et du Royaume-Uni au sud, du parallèle 4° 10' nord avant 1891

24. Je l'ai déjà dit, Monsieur le président, ni la Malaisie, ni, je dois le reconnaître, l'Indonésie, n'ont pu fournir à la Cour de preuves irréfutables du contrôle effectif de Pulau Ligitan et Pulau Sipadan par le sultan de Sulu ou celui de Boeloengan avant 1891. Il n'en reste pas moins qu'alors que la Partie malaisienne ne peut faire état de la présence dans les parages ni de Sulu, ni de la BNBC, ni de la Grande-Bretagne, il en va différemment s'agissant de Boeloengan et des Pays-Bas qui y étaient établis, de façon certaine, à la veille de la conclusion de la convention de 1891.

25. Commençons, si vous le voulez bien, par l'absence de Sulu ou des Britanniques. Et cela peut aller très vite : ils ne sont, en effet, purement et simplement pas là !

26. Oh, bien sûr, il y a le texte de la concession de 1878, par laquelle le sultan de Sulu concède à Dent et Overbeck tous les droits et pouvoirs lui appartenant

> *«over all the territories and lands which are tributary to us on the mainland of the island of Borneo from the Pandasan river ... to the southward thereof on the coast of Darvel Bay as far as the Sibuku River with all the islands included therein within nine miles of the coast»* (voir mémoire de la Malaisie, vol. 2, annexe 9).

Mais ce texte appelle plusieurs remarques :

— en premier lieu, le sultan cède les droits lui appartenant; or *nemo plus juris transferre potest quam habet*; en d'autres termes, s'il n'exerçait pas de droits de souveraineté sur les territoires en cause, ceux-ci n'ont, par définition, pu être cédés à Dent et Overbeck puis à la BNBC;

— en deuxième lieu, il est frappant que le sultan de Sulu se garde bien, justement, d'évoquer sa «souveraineté»; il ne mentionne que les «territoires et terres *tributaires*» (*«territories and lands which are tributary to us»*); comme le relève le mémorandum britannique de 1879 que j'ai déjà cité :

> *«From the use of the word 'tributary', it might be argued that the Sultan of Sulu did not possess absolute sovereignty over the territory in question, and on that ground his right to cede it might be questioned. This argument would, however, appear to tell us as much against the cession to Messrs Dent and Overbeck, as against the recent cession to Spain»* (mémoire de l'Indonésie, vol. II, annexe 20);

— en troisième lieu et enfin, la Malaisie ne se pose aucune question quant à l'emplacement de la rivière «Sibuku» ou «Siboehoe» qu'elle assimile à la rivière «Sibuko» qui se jette dans la baie du même nom face à l'île de Nanoekan, à peu près exactement à la hauteur du 4e parallèle nord. Elle a tort de ne pas se poser de question.

27. Il est remarquable que la concession Dent/Overbeck semble considérer que le fleuve en question se jette non dans Sibuko Bay, mais *dans Darvel Bay*, qui est située à une centaine de kilomètres plus au nord. Or, plusieurs rivières se jettent dans Darvel Bay, comme le montre le croquis projeté derrière moi, dont une au moins, la rivière «Subakun» ou «Sabahan», a un nom dont la consonance est proche de «Sibuku» (voir mémoire de l'Indonésie, Map Atlas, cartes n°s 12, 14 ou 18). La Malaisie contemporaine elle-même ne sait pas très bien où elle en est à cet égard : dans son mémoire (cartes n° 3 et n° 7) ou sa réplique (carte n° 1), elle désigne cette rivière sous le nom de «Sabahan», mais elle l'appelle «Subakun» dans son contre-mémoire (carte n° 1); on comprend que le sultan de Sulu n'ait pas été très au net à cet égard il y a plus de cent-vingt ans…

28. Cette incertitude n'avait pas échappé au comte de Bylandt, ambassadeur des Pays-Bas à Londres et principal négociateur néerlandais de la convention de 1891, qui, dans un courrier du

1^er^ décembre 1882 au comte Granville, secrétaire britannique au Foreign Office, estimait que la rivière était «située à l'est de Batoe Tinagat [je reviendrai sur cette expression dans un instant — par. 39] et par conséquent en dehors du territoire néerlandais» (mémoire de l'Indonésie, vol. 2, annexe 31 ; voir aussi annexe 47). Tel est le cas de la Subakun.

29. Cette localisation de la limite méridionale de l'influence de Sulu est d'autant plus probable qu'elle est compatible non seulement avec les prétentions que les Pays-Bas ont fait valoir durant la négociation de la convention, mais aussi avec leur présence effective (et avec celle de Boeloengan) sur le terrain dans la période qui a précédé la négociation. Il existe de multiples preuves de cette présence — alors que, j'y insiste, la Malaisie ne peut, de son côté, faire état *d'aucune* présence effective de Sulu ou de la BNBC dans la région et qu'elle reconnaît que ce n'est qu'en 1892, après la signature de la convention de 1891 et en conséquence de celle-ci, que la compagnie s'est établie à l'embouchure de la rivière Tawau (cf. contre-mémoire de la Malaisie, p. 53, par. 3.2), qui se trouve à la latitude 4° 20' nord.

30. Certes, comme la Malaisie le rappelle dans sa réplique (p. 69, par. 5.9), Semporna fut fondée en 1887 par la BNBC, mais Semporna se trouve sur *Darvel Bay* sur le parallèle 4° 25' nord — pas sur *Sebuko Bay*. Et, contrairement à ce que fait valoir la Partie malaisienne (*ibid.*, p. 68, par. 5.7-5.8), la question de savoir quelles étaient les limites respectivement septentrionale de Boeloengan et des Pays-Bas d'une part, et méridionale de Sulu et de la BNBC d'autre part (en admettant que la notion de «limite» fût pertinente — ce qu'elle n'était que de manière relative) — cette question, disais-je, n'est nullement dénuée d'intérêt à deux points de vue :

— d'une part, comme je l'ai rappelé, les sultans locaux considéraient que les petites îles inhabitées se trouvant au large des territoires placés sous leur autorité leur appartenaient;

— d'autre part, ce problème fut au centre des controverses anglo-néerlandaises qui aboutirent à l'adoption du compromis de 1891.

31. Or, il ne fait aucun doute que les Néerlandais étaient établis au nord du parallèle 4° 10' finalement retenu. Je me permets, Monsieur le président, d'évoquer brièvement les éléments qui le prouvent sans l'ombre d'un doute :

32. 1) Comme vient de le rappeler mon collègue et ami Alfred Soons, les Pays-Bas ont conclu, en 1850, un «contrat» avec le sultan de Boeloengan qui incluait expressément l'ensemble

de l'île de Sebatik et la rivière Tawau dans le territoire de celui-ci et fixait sa frontière avec Sulu «au cap nommé Batoe Tinagat» (mémoire de l'Indonésie, vol. annexe 13. La même formule a été reprise lors du renouvellement de ce contrat, en 1878 (*ibid.*, annexe 19). Ce dernier contrat fut communiqué à la Grande-Bretagne le 17 janvier 1880 (voir *ibid.*, annexe 38) sans entraîner aucune protestation de sa part, ce que les écritures malaisiennes passent pudiquement sous silence (cf. contre-mémoire de la Malaisie, p. 12, par. 2.9, ou réplique de la Malaisie, p. 27-28, par. 3.7), alors même qu'il y a là une claire reconnaissance de l'absence de toute revendication de la part du Gouvernement britannique — reconnaissance d'autant plus significative que cet épisode intervient deux ans après la concession Dent/Overbeck et que Londres, qui avait suivi de très près la conclusion de cette concession, était sur le qui-vive.

33. 2) Conformément à cette définition de leurs possessions à Bornéo, les Hollandais s'établirent effectivement à Batoe Tinagat à partir de 1849 (cf. mémoire de l'Indonésie, vol. 3, annexes 57 et 58), y hissèrent à nouveau solennellement leur drapeau en 1879 et s'assurèrent le contrôle de la rivière Tawau (cf. le mémorandum sur la ratification de la convention de 1891 devant la seconde Chambre des Etats généraux néerlandais; mémoire de l'Indonésie, vol. 3, annexe 77 ; voir aussi les documents cités dans le mémoire de l'Indonésie, p. 57, note 72; réplique de l'Indonésie, p. 89, par. 5.17 et l'opinion du professeur V. J. H. Houben, annexée au contre-mémoire de la Malaisie, app. 1, par. 5.2). Il n'est pas sans intérêt de relever que, dans un mémorandum de 1889, Hertslet, pourtant gardien sourcilleux des intérêts coloniaux britanniques, semble considérer que cette situation n'est pas déraisonnable (mémoire de l'Indonésie, vol. 2, annexe 38 ; voir aussi annexe 36).

34. 3) Du reste, un incident qui prend place en 1883, et auquel le professeur Soons a déjà fait allusion, est extrêmement significatif de la situation telle qu'elle prévalait à l'époque. Je le relate dans les termes employés par Hartsen, ministre néerlandais des affaires étrangères, dans une dépêche de 1888 au comte de Bylandt — dépêche dont le texte fut communiqué au marquis de Salisbury sans que celui-ci lui y oppose de démenti :

> «La «British North Borneo Company» a essayé le 8 septembre 1883 de hisser un pavillon sur la rive gauche du fleuve Siboekoe, mais l'a retiré sur les représentations du contrôleur Néerlandais à Batoe Tinagat, où le drapeau néerlandais n'a cessé de flotter.» (Mémoire de l'Indonésie, annexe 37.)

Voici qui établit sans le moindre doute que les Britanniques voulaient y être mais n'y étaient pas; alors que les Néerlandais y étaient fermement établis et avaient la capacité de faire respecter leurs droits.

35. 4) Ils s'en étaient d'ailleurs donnés les moyens en menant une activité navale relativement intense tout au long de la côte orientale de Bornéo jusqu'à Darvel Bay. La présence du navire *Admiraal Van Kinsbergen*, un navire de guerre néerlandais, est attestée à Sipadan et Mabul en 1876; je n'y reviens pas, le professeur Soons en a parlé. Plus généralement, la présence navale néerlandaise au nord du parallèle 4° 10' est attestée par de multiples documents (voir réplique de l'Indonésie, p. 28, par. 1.41 et p. 88-89, par. 5.17).

36. 5) La preuve indiscutable de la présence de Boeloengan au nord du parallèle 4° 10' nord avant la conclusion de la convention de 1891 est apportée par la demande expresse du sultan de subordonner la cession de son territoire à la reconnaissance du droit pour la population de Boeloengan de récolter des produits forestiers dans la région située entre Broershoek et Batu Tinagat durant quinze ans (cf. mémoire de l'Indonésie, vol. 3, annexe 77). Ce droit est du reste expressément reconnu par l'article VII de la convention, aux termes duquel : «*The population of Boelongan shall be allowed to collect jungle produce in the territory between the Simenggaris and the Tawao Rivers for fifteen years from the date of the signature of the present Convention, free from any tax or duty.*» (Mémoire de l'Indonésie, vol. 3, annexe 75.)

Cette consécration des droits acquis de Boeloengan ne laisse aucun doute sur le fait que l'autorité du sultan s'étendait au nord du parallèle retenu pour frontière en 1891 et au sud duquel sont situées les îles en litige.

37. Sans doute, les activités tant de Boeloengan que des Néerlandais concernent avant tout le «continent» — car Bornéo est un véritable continent —, plus que les îles en litige elles-mêmes; il n'en reste pas moins que ces activités établissent qu'ils étaient, les uns et les autres, effectivement présents dans la région et jusqu'à une latitude bien plus septentrionale que le parallèle 4° 10' nord (Batoe Tinagat se trouve environ à 4° 14' nord et la source de la rivière Tawau à à peu près à 4° 40') alors que Semporna, qui constitue l'avancée la plus méridionale de la BNBC avant la signature de la convention, est située sur le parallèle 4° 50' nord environ. Dès lors, il n'est pas douteux que, conformément à la conception que se faisaient les sultans locaux de leur autorité

territoriale, celui de Boeloengan considérait comme siennes toutes les îles de la région — où, je le répète à nouveau, ni Sulu ni les Britanniques n'avaient *aucune* activité avant 1891.

38. En résumé, Monsieur le président, au moment où s'engagent les négociations qui vont aboutir à la conclusion de la convention anglo-néerlandaise, la situation est la suivante :

- les sultans locaux, y compris, bien sûr, ceux de Boeloengan et de Sulu, n'ont pas la même conception de la notion de territoire que leurs interlocuteurs européens — ce qui explique peut-être l'apparente facilité, en tout cas déconcertante pour des internationalistes du début du XXI^{e} siècle, avec laquelle ils cèdent aux puissances coloniales les droits leur appartenant sur leurs territoires;
- ils manifestaient peu d'intérêt pour les petits îlots inhabités se trouvant au large des territoires qu'ils contrôlaient — ce qui explique sûrement pour une bonne part pourquoi aucune des deux Parties au présent différend n'a pu fournir de preuve explicite de la présence qui de Sulu, qui de Boeloengan, à Ligitan ou à Sipadan avant 1891;
- il n'en reste pas moins que ces îles se trouvent au large de territoires contrôlés par les Pays-Bas, revendiqués comme siens par le sultan de Boeloengan et, conformément aux conceptions territoriales qui prévalaient alors, elles devaient, dès lors, être considérées comme lui appartenant.

39. Qu'en déduire ? D'abord et évidemment que le sultan de Sulu ne pouvait revendiquer (ni ne revendiquait) aucun droit au sud de Darvel Bay. Et cette conclusion n'est pas tenue en échec par un argument, sur lequel s'appesantit la réplique malaisienne (p. 30-31, par. 3.12), selon lequel, de l'aveu des Néerlandais, la limite des possessions des Pays-Bas était, «à l'est : Batoe Tinagat». Cette affirmation s'explique par son contexte : les négociations en cours devaient aboutir à diviser l'île de Bornéo en une partie située au nord, qui reviendrait à la Grande-Bretagne, et une partie située au sud, appartenant aux Pays-Bas; à cette fin, il fallait s'accorder sur une ligne est-ouest et il était parfaitement naturel que les représentants néerlandais considèrent comme tout indiqué pour atteindre ce but, de tracer une ligne laissant au sud les territoires qu'ils occupaient «en partant du point extrême à l'ouest : Tandjong Datoe, jusqu'au point extrême à l'est : Batoe Tinagat» (mémoire de l'Indonésie, vol. 2, annexe 37; dépêche de M. Hartsen au comte de Bylandt). Il va de soi que le choix de ces deux points à l'ouest et à l'est, dans le seul but de permettre une division

territoriale nord/sud, ne peut évidemment avoir aucune implication en termes de délimitation est/ouest des territoires.

40. Cette première conclusion suffit à mettre à mal toute l'argumentation malaisienne, que celle-ci suive la «piste BNBC» ou la voie, plus sinueuse, «Espagne/Etats-Unis/Royaume-Uni» : dans les deux cas, la Malaisie se heurte à une impasse : elle ne peut se proclamer héritière du sultan de Sulu, dont il est flagrant qu'il n'avait ni droits ni présence effective dans la région au large de laquelle se trouvent les îles que la Partie malaisienne revendique aujourd'hui.

41. Il reste que, aussi indiscutable que fût la présence néerlandaise jusqu'à Batoe Tinagat et la rivière Tawau, celle-ci était contestée par les Britanniques, sur le seul fondement de la concession Dent/Overbeck, qui mentionnait comme limite septentrionale la rivière Sebuko «sur la côte *de Darvel Bay*». Aussi peu fondée que fût cette revendication, c'est sur cette base que les Britanniques abordèrent les négociations de la convention de 1891, qui devait régler complètement et définitivement le différend territorial entre les deux Etats.

III. Le règlement définitif du différend territorial par la convention de 1891

42. L'Indonésie a longuement exposé dans ses écritures les travaux préparatoires de la convention de 1891 (mémoire de l'Indonésie, p. 61-82, par. 5.2-5.40; contre-mémoire de l'Indonésie, p. 82-89, par. 5.59-5.76 et réplique de l'Indonésie, p. 7-32, chap. 1). Je n'y reviendrai que dans la mesure où ceci est utile pour répondre à la réplique malaisienne, qui est du reste fort discrète à cet égard — ce qui me permettra d'être relativement bref, même s'il me faut replacer les choses en perspective.

43. Ce contexte tient en trois propositions :

1) la Grande-Bretagne et les Pays-Bas étaient tous deux conscients des incertitudes affectant les limites territoriales des Sultanats de Sulu et de Boeloengan dont ils se réclamaient respectivement;
2) les deux Parties se sont entendues pour régler définitivement leur différend territorial dans la région; et
3) elles l'ont réglé sur la base d'une ligne de compromis constituée par le parallèle 4° 10' nord.

44. Inutile, Monsieur le président, de m'attarder sur la claire conscience qu'avaient tant les Britanniques que les Néerlandais des incertitudes relatives aux limites exactes de leurs possessions respectives ; comme je l'ai déjà souligné il y a quelques instants (voir notamment par. 18 ci-dessus). Quelques citations complémentaires tout de même.

45. Du côté britannique d'abord :

— dans son mémorandum de 1879 relatif aux avantages politiques, stratégiques, commerciaux que présentait le Nord-Bornéo pour la Grande-Bretagne, qui fixe la position dont les négociateurs britanniques s'inspireront durant toutes les négociations, Hertslet constate «*The territories in Borneo in the actual occupation of the* Dutch, *the Sultan of* Brunei, *and the Sultan of* Sulu, *are not clearly defined*» (mémoire de l'Indonésie, vol. 2, annexe 21; voir aussi annexe 28, *passim*);

— même constatation, deux ans plus tard, dans les observations des lords commissaires de l'Amirauté sur le projet de charte d'incorporation de la BNBC : «*it appears that the south-eastern boundary is not clearly fixed with regard to the claims of the Dutch on that part of the coast*» (mémoire de l'Indonésie, vol. 2, annexe 24).

46. Quant aux Néerlandais, ils se montrent tout aussi incertains, sinon durant les négociations elles-mêmes, du moins lors des débats parlementaires préalables à la ratification de la convention de 1891 (cf. mémoire de l'Indonésie, vol. 3, annexes 77, 84 et 86).

47. Très logiquement, des deux côtés, on se montre soucieux de mettre un terme définitif à l'ensemble de ces incertitudes. Et, ici encore, Madame et Messieurs de la Cour, je crains qu'il me faille vous infliger la lecture de plusieurs citations. Elles ne laissent place à aucune ambiguïté.

48. Les Britanniques manifestent, dès 1881, leur intention de définir complètement et définitivement les limites de leur protectorat sur le nord de Bornéo. Ainsi, Pauncefote, fonctionnaire du Foreign Office, écrit à Peel (le représentant des lords commissaires de l'Amirauté), au nom de lord Granville : «*I am now to request that you will state to the Lord President of the Council that* all questions *of boundaries [I stress all questions] in regard to the ceded territory will be settled as soon as possible*» (mémoire de l'Indonésie, vol. 2, annexe 24, les italiques sont de nous). La suite de la phrase fait allusion à l'article 6 du projet de charte (voir mémoire de l'Indonésie, vol. 2, annexe 23), par lequel la Grande-Bretagne

imposait à la compagnie de ne pas s'opposer à l'acceptation de revendications territoriales par des tiers si le secrétaire d'Etat considérait souhaitable d'y déférer, ce qui confirme le peu d'assurance du Gouvernement britannique quant à l'extension territoriale exacte de la concession Dent/Overbeck (voir aussi la lettre de lord Granville au comte de Bylandt du 21 novembre 1881, mémoire de l'Indonésie, vol. 2, annexe 24).

49. Les Néerlandais, pour leur part, font preuve de préoccupations identiques. Ainsi, dans une lettre du 19 novembre 1888 à lord Salisbury, secrétaire d'Etat britannique, sir Horace Rumbold, qui était ministre plénipotentiaire britannique à La Haye, rapporte en ces termes une conversation avec Hartsen, ministre néerlandais des affaires étrangères :

> *«His Excellency [that is Hartsen] further observed how desirable it was that the two Powers who were interested in Borneo should come to a complete understanding which would not leave room for any third Power to step in at any time and claim territory there as being res nullius.»* (Mémoire de l'Indonésie, annexe 35 ; voir aussi mémoire de l'Indonésie, vol. 2, annexe 37.)

Ce souci d'aboutir à une délimitation complète et définitive a été confirmé par le ministre néerlandais des affaires étrangères, lors des débats parlementaires préalables à la ratification (cf. mémoire de l'Indonésie, vol. 3, annexe 86).

50. Dès 1883, les Britanniques proposèrent de mettre fin au différend par un compromis, ce qui, dans un premier temps, fut refusé par le comte de Bylandt au nom du gouvernement de La Haye (cf. le projet de mémorandum de Hertslet du 20 décembre 1888, mémoire de l'Indonésie, annexe 36; voir aussi annexe 40). L'idée fut cependant reprise avec la création de la commission bilatérale au début de l'été 1889. Les délégués britanniques reçurent instruction de négocier un compromis (le mot figure dans les notes internes du Foreign Office — cf. mémoire de l'Indonésie, vol. 2, annexe 56) et insistèrent pour qu'il en soit ainsi dès la deuxième réunion de la commission, le 19 juillet 1889 (mémoire de l'Indonésie, vol. 3, annexe 58), ce que le comte de Bylandt accepta lors de la troisième, le 27 juillet (mémoire de l'Indonésie, vol. 3, annexe 59; voir aussi annexe 62 et contre-mémoire de l'Indonésie, vol. 2, annexe 17), et ce qu'approuvèrent les directeurs de la BNBC un an plus tard (mémoire de l'Indonésie, vol. 3, annexe 61). Le mémorandum explicatif présenté au Parlement par le Gouvernement néerlandais confirme que telle fut bien la démarche suivie par les Parties (cf. mémoire de l'Indonésie, vol. 3, annexe 77).

51. L'Indonésie a montré dans ses écritures que, si les Parties furent d'abord soucieuses de régler la question de la frontière «terrestre», elles ne s'intéressèrent pas moins aux îles environnantes, seuls endroits, soit dit en passant, où pouvait se poser la question des *res nullius*, qui préoccupait Hartsen comme je l'ai rappelé il y à un instant. Je n'ajouterai que deux éléments, sur lesquels nous n'avons peut-être pas suffisamment insisté :

— d'une part, le croquis annexé aux remarques du conseil des directeurs de la BNBC sur le projet de compromis de 1890, reproduit sous le n° 22 des dossiers de plaidoiries, fait apparaître la quasi-totalité des îles de la région, et expressément Sipadan (mémoire de l'Indonésie, vol. 3, annexe 61), ce qui montre sans doute possible que ces îles étaient concernées par la délimitation entreprise et que la compagnie s'en souciait;

— d'autre part, le document interne au Foreign Office britannique, reproduit à l'annexe 56 au mémoire indonésien (vol. 2), sur la base duquel a été établie la position de négociation britannique, est extrêmement significatif; la ligne de partage entre les possessions néerlandaises et le territoire relevant de la BNBC y est décrite de la manière suivante, qu'illustre le croquis projeté derrière moi, c'est le n° 23 dans vos dossiers :

— depuis un point A situé sur la côte de Bornéo près de Broers Hoek sur le parallèle 4° 10' nord ;

— la ligne devait, conformément à ces instructions, suivre ce parallèle 4° 10' nord jusqu'à un point B, à l'intersection du méridien 117° 39' de longitude est face à l'extrémité de l'île de Noenoekan ;

— de là, la ligne s'orienterait vers le sud-est, le long du chenal séparant Sébatik de Noenoekan, jusqu'à un point C, où le 4° parallèle rencontre le méridien 117° 50' est ;

— enfin, et c'est cela qui est significatif, *«[t]he line would continue thence in an Easterly direction along the 4th parallel, until it should meet the point of intersection of the meridian of 11°° 44' 30" marked D».*

52. Ce point D, figure d'ailleurs sur une carte, extraite de la carte Stanford de Nord-Bornéo et utilisée par la délégation britannique — qui l'a annotée — durant les discussions de la commission mixte; ces annotations semblent être de la main de sir Edward Hertslet. Cette carte a été retrouvée dans les archives du Foreign Office (PRO ref. FO 12/86) dans un lot portant la

mention manuscrite : *«Borneo — Copies of Maps handed in at the Joint Commission July 1889»*. Elle est incluse sous le n° 24 dans les dossiers de plaidoirie.

53. Il en va de même de la ligne ajoutée sur un autre exemplaire de la même carte, très probablement par la BNBC à titre d'illustration de sa proposition de compromis. Cette fois, la ligne est figurée en vert (couleur retenue pour les limites des possessions de la BNBC) et en jaune (qui marque celles du territoire néerlandais). Elle va de l'emplacement du point C mentionné dans le document préparatoire aux instructions britanniques jusqu'aux limites de la carte.

54. Sans doute, dans tous ces cas, remarquablement concordants, la ligne, qui passe au sud de Sebatik, suit-elle, en mer, le quatrième parallèle nord et non le parallèle 4° 10' — mais là n'est pas la question : les cartes que vous venez de voir, Madame et Messieurs les juges, montrent, sans l'ombre d'un doute, que les Britanniques, conformément à leurs instructions, entendaient parvenir à un compromis global, en mer comme sur terre. Qu'elle soit bleue, jaune ou verte, la ligne proposée par eux englobait la mer, et ce jusqu'aux limites externes de la carte sur laquelle les négociateurs se fondaient, et qu'ils avaient communiquée à leurs interlocuteurs néerlandais.

55. C'est d'ailleurs sur l'une de ces cartes, envoyée à La Haye au ministre des affaires étrangères Hartsen au lendemain de la fin des négociations de la commission mixte le 28 juillet 1889, que le comte de Bylandt, ambassadeur à Londres et principal négociateur néerlandais, a reporté au crayon la ligne finale de compromis proposée par les Britanniques. On remarquera qu'il y est expressément indiqué qu'elle était jointe au mémorandum de sir Edward Hertslet du 20 décembre 1888 *(«With Sir E. Hertslet's Memo of December 20th 1888»)*, ce qui confirme qu'il s'agit bien d'un document utilisé lors de la négociation. Cette carte est projetée derrière moi. Elle figure en l'état en annexe 22 au contre-mémoire indonésien (vol. 2) et est reproduite dans les dossiers de plaidoiries sous l'onglet n° 26; mais pour rendre plus visibles les ajouts effectués par le principal négociateur néerlandais, nous les signalons à l'écran par des flèches et des cercles rouges. L'enclave de Batu Tinagat a été refusée par Bylandt du fait de l'impossibilité de la défendre (cf. contre-mémoire de l'Indonésie, vol. 2, annexe 21). En revanche, la ligne au crayon figurant entre les deux flèches rouges est bien la ligne de compromis final. Elle court à l'est jusqu'à la marge de la carte.

56. La carte néerlandaise de 1885, également surchargée par le comte de Bylandt, (la mention «10' proposition de l'amiral Mayne» — je ne me hasarderai pas à lire cette mention en néerlandais, langue qui conserve pour moi des mystères absolus !); cette carte, disais-je, présente les mêmes caractéristiques et appelle les mêmes remarques que la précédente; elle figure sous l'onglet n° 27 dans les dossiers de plaidoiries. Et une carte se trouvant dans les archives de Sabah (Map P51/94) est annotée de la même manière. L'Indonésie n'a, malheureusement, pu se procurer cette carte et la Malaisie n'a pas cru devoir la produire alors même que le contre-mémoire indonésien en signale clairement l'existence (contre-mémoire de l'Indonésie, p. 88, par. 5.72).

57. Dans sa réplique, la Partie malaisienne conteste la valeur probante des annotations portées par le comte de Bylandt sur les cartes Stanford et Stemfort de 1885, qui montrent nettement que la ligne 4° 10' nord était, dans l'esprit des négociateurs, prolongée vers l'est. Selon nos contradicteurs, ces reports au crayon seraient discrédités par le fait que la ligne ainsi ajoutée continuait également à l'ouest de Sebatik et, dans les deux cas, jusqu'aux limites extérieures des cartes (réplique de la Malaisie, p. 44, par. 4.10).

58. Pour la Malaisie, le tracé de cette ligne de part et d'autre de Sebatik s'expliquerait simplement par le fait que Bylandt aurait utilisé *«a pencil and ruler to trace the 4° 10' N parallel right accross the map» (ibid.)*. Outre que l'on peut utiliser une règle sans, pour autant, la suivre au crayon sur toute sa longueur, il y a une explication autrement plus convaincante au prolongement du trait à l'ouest de Sebatik et de Broers Hoek (sur la côte) : à ce stade des négociations (nous sommes le 27 juillet 1889), la seule proposition britannique consistait à adopter le parallèle 4° 10' nord; il était logique que le comte de Bylandt la reporte tant en mer que sur terre, comme cela a d'ailleurs été fait sur *toutes* les cartes annotées durant les négociations, y compris sur celle portant proposition de la BNBC.

59. Contrairement aux assertions malaisiennes, il ne s'agit pas de coups de crayons maladroits suivant par inadvertance une règle ayant miraculeusement la longueur de la carte, il s'agit bien de la traduction cartographique des discussions entre les Parties dont cette série de cinq cartes, qui coïncident parfaitement — non par le tracé mais par ce qu'elles révèlent de l'objet des discussions —, montre à l'évidence que ces négociations portaient sur la mer située à l'est de Sebatik aussi bien que sur la terre se trouvant à l'ouest.

60. Les discussions furent globales, Monsieur le président; le compromis sur lequel elles débouchèrent le fut aussi. Il a consisté à fixer au parallèle 4° 10' nord la limite entre les possessions respectives des Néerlandais et des Britanniques, sur terre, comme en mer. De cette manière étaient levées toutes les incertitudes qui affectaient les délimitations territoriales entre les sultanats locaux — et tel était, en effet, l'objet de l'exercice; il n'eût pas été atteint si le sort des îles environnantes avait dû rester indécis.

Madame et Messieurs les juges, je vous remercie pour votre attention. Et je vous prie, Monsieur le président, de bien vouloir donner la parole à sir Arthur Watts qui, durant les dix quinze minutes qui restent, commencera à analyser la convention de 1891. Merci beaucoup.

Le PRESIDENT : Je vous remercie, Monsieur le professeur et je donne maintenant la parole à sir Arthur Watts.

Sir Arthur WATTS :

The 1891 Convention

Mr. President and Members of the Court, I turn now to the 1891 Convention.

Introduction

1. The background has been explained by Professor Soons and by Professor Pellet. They have shown how the initially uncertain territorial relationship between the Sultan of Boeloengan and the Sultan of Sulu carried over into an equally uncertain territorial situation as between the Netherlands and Great Britain; and they have shown how those two States set the matter at rest by the conclusion of the 1891 Convention. By that Convention the parties intended to put an end once and for all to the uncertainties which existed as to the territorial extent of their colonial possessions in this north-eastern corner of Borneo.

2. It is now necessary to examine, with some care, the terms of that Convention, in so far as they relate to the question of sovereignty over Sipadan and Ligitan.

Terms of the Convention

(a) *Object and purpose*

3. First, it is necessary to say something about its object and purpose. Of course, the broad political purpose of the Convention has been explained by Professor Pellet — the parties wanted to settle the outstanding territorial uncertainties in the area, so that they would know within what territorial limits they were responsible for social, political and economic development.

4. The Convention itself, however, dealt with the matter briefly. As set out in its preamble, its purpose was that of "defining the boundaries between the Netherlands possessions in the Island of Borneo and the States in that island which are under British protection", and they accordingly "resolved to conclude a Convention to that effect . . . for that purpose".

5. It is to be noted that nothing in this language establishes that the purpose of the Convention was to define only the parties' *land* boundaries in the area. That term — "land" — is not used in the preamble. Nor does the use of the term "boundaries" carry with it any implication that only land boundaries are being dealt with, as was shown by Indonesia in its Counter-Memorial[1].

6. Nor can it be convincingly argued, as Malaysia seeks to do, that the 1891 Convention has to be treated as "only" a boundary treaty, and not as a treaty allocating title to possessions according to their location on one side or the other of an agreed line. In the *Frontier Dispute* case[2], the Court treated the distinction made by writers between "delimitation disputes" and "disputes as to the attribution of territory" as more important in theory than in practice: the same is true here, as regards the distinction sometimes alleged between so-called boundary treaties and so-called allocation treaties. As a practical matter, both kinds of treaties attribute territorial sovereignty to one or other of the States concerned.

7. The alleged distinction between them is inherently academic, artificial, and in practice irrelevant. Moreover, as shown by Indonesia in its Counter-Memorial[3], any treatment of the 1891 Convention as "only" a boundary treaty rather than as an allocation treaty is inconsistent both with the behaviour of the parties and with State practice generally. Not only, as Indonesia has

---

[1] Counter-Memorial of Indonesia, paras. 5.8, 5.12; see also Reply of Indonesia, para. 2.24.

[2] *I.C.J. Reports 1986*, p. 564, para. 18.

[3] Counter-Memorial of Indonesia, paras. 5.8-5.12.

shown, do States regularly use the term "boundary" to refer to maritime areas, but they also use that term in relation to treaties which, on any analysis, would be regarded by writers as an allocation treaty.

8. Nor does the reference in the preamble to the boundaries in question being "in the Island of Borneo" imply that the parties' only concern was with land-based boundaries, as Indonesia has also shown in its Counter-Memorial[4].

9. In fact, the language used in the preamble shows the contrary. The term "possessions" is as apt to cover island possessions as it is for mainland possessions — as is shown, indeed, by the substantive provisions of the Convention which, as we shall see, deal expressly with the boundary in the island of Sebatik.

10. Moreover, by referring in the preamble to "*the* . . . possessions" of the Netherlands, the parties were evidencing their intention to deal with *all* those possessions in the region. On the other side, by referring to the boundaries of "the States . . . which are under British protection" the parties were similarly demonstrating their intention to cover *all* the territories of those States, whether mainland or insular — particularly as the term "possessions" is also used in Article I to refer to the British territories affected by the boundary.

11. In any event, the object and purpose of the treaty is not determined solely by reference to whatever is set out in its preamble. The parties' object and purpose in concluding a treaty are also to be determined from their dealings in the period leading up to its conclusion. Thus in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[5], the Court ascertained the object and purpose of the so-called "Doha Minutes" from an enquiry into the general circumstances surrounding their adoption and the underlying attitudes of the parties at the time the Minutes were adopted.

12. With the present Convention, where the existence of uncertainties over the extent of each party's possessions carried with it the likelihood of continuing disputes, it was clear that the parties' underlying purpose was to resolve their territorial uncertainties once and for all. Those uncertainties extended to island territories as much as to mainland territories. It is accordingly fully

---

[4] Counter-Memorial of Indonesia, para. 5.14 *(e)*. See also Memorial of Indonesia, para. 5.43 *(i)*.

[5] *I.C.J. Reports 1995*, pp. 17 *et seq.*

in accord with that basic object and purpose of the Convention that it should be treated as dealing with all offshore islands in the region: put the other way, it would *not* be in accord with that object and purpose to treat the Convention as not dealing with island possessions, for that would leave them open as potential sources of future territorial disputes.

13. In short, the allocation of title to islands was an integral part of the Convention's main purpose.

14. With that in mind, let me now turn to look at the substantive provisions of the Convention, giving effect to its purpose as defined.

Mr. President, I could stop there, if that would be convenient, but I could equally go on for another five or six minutes, if that would be your preference.

Le PRESIDENT : Je crois que nous pouvons nous arrêter là parce que vous allez entrer dans l'analyse des différents articles du traité et qu'il est préférable que cette analyse se fasse de manière cohérente. La séance va donc être levée maintenant et nous reprendrons l'audience cet après-midi à 15 heures. Je vous remercie.

L'audience est levée à 13 heures.

CR 2002/28

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2002

Public sitting

held on Monday 3 June 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le lundi 3 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present: President Guillaume
Vice-President Shi
Judges Oda
Ranjeva
Herczegh
Fleischhauer
Koroma
Vereshchetin
Higgins
Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Buergenthal
Elaraby
Judges _ad hoc_ Weeramantry
Franck

Registrar Couvreur

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,
Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,
Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague
Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRÉSIDENT : Veuillez vous asseoir. La séance est ouverte et je donne à nouveau la parole à sir Arthur Watts.

Sir Arthur WATTS: Thank you, Mr. President. Before lunch I had explained that, in short, the allocation of title to islands was an integral part of the 1891 Convention's main purpose, which was to settle all territorial disputes in the area. With that in mind, let me now turn to look at the substantive provisions of the Convention giving effect to that purpose as defined. The full text of the Convention is at tab 1 in the judges' folders. The first three articles can be disposed of, for our present purposes fairly quickly.

(b) *Article I*

15. Article I establishes that the boundary between the Dutch and British possessions "shall start from 4° 10' north latitude on the east coast of Borneo". This was, the Court will recall, the compromise starting point agreed during the negotiations, representing the location of Broershoek on the mainland coast. That provision merely established the starting point for the boundary. From there it went both ways, westwards and eastwards.

(c) *Articles II and III*

16. The westward boundary, going inland across the mainland of Borneo, is delimited in Articles II and III. Those Articles are not directly relevant, and for the moment may be left on one side — although, for purposes of comparison, it will be helpful to refer to them later.

(d) *Article IV*

17. The boundary running eastward from its agreed starting point is of central importance for the present case. Its delimitation is set out in Article IV of the Convention. It is on the screen now, and, as I said, it is in the text of the Convention which is at tab 1 in the judges' folders. It reads as follows:

> **"From 4° 10' north latitude on the east coast the boundary line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."**

18. Indonesia's contention as to the meaning of that Article has been briefly set out earlier. It is that Article IV established the 4° 10' N parallel latitude as a line of division between all British and Dutch possessions in the area. Moreover, given the starting point at Broershoek on the coast, the line is to be "continued eastward" — the words used in Article IV — so far as necessary, including out to sea, to achieve that basic task of settling all disputes and dividing all territories.

19. The reasons which lead Indonesia to that view will be set out in full in a few moments. First, it is necessary just to note that in attributing meaning to Article IV, the rules for the interpretation of treaties are to be applied. Those rules are set out in Article 31 of the Vienna Convention on the Law of Treaties, and that provision, as the Court has affirmed (recently in the case concerning *Kasikili/Sedudu Island*[1]), reflects customary international law. That case concerned a treaty concluded in 1890, just a year earlier than the Anglo-Dutch Convention presently in issue, and there is no doubt that the same conclusion applies to it.

20. Article 31 is well known. It requires a treaty to "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

21. It is thus not just the "ordinary meaning" of the terms of the 1891 Convention which governs their interpretation, but that meaning in the context in which those terms are used, and in the light of the Convention's object and purpose.

22. The context of a treaty for the purpose of its interpretation can be clarified in a number of respects. Article 31 of the Vienna Convention itself indicates in this connection that the text of the treaty and its preamble and annexes are part of its context, as are certain agreements or instruments made by the parties in connection with the conclusion of the treaty. As the International Law Commission explained in its Commentary to the draft Articles on the Law of Treaties, the context of a term of a treaty "is not merely the article or section of the treaty in which the term occurs, but the treaty as a whole"[2]. Moreover, following several judgments of the Court cited in Indonesia's Counter-Memorial[3], account must also be taken of the general context of the treaty's conclusion.

---

[1] *I.C.J. Reports 1999*, Judgment of 13 December 1999, para. 18.

[2] Commentary to draft Art. 27, para. 12.

[3] Counter-Memorial of Indonesia, para. 5.29.

23. In applying these rules of interpretation to Article IV of the 1891 Convention, a number of points stand out.

24. First, it is necessary to recall that the underlying object and purpose of the Convention was to settle which State had sovereignty over which possessions, so that all future disputes, such as those of which there had already been signs, would be avoided.

25. The Convention refers to delimiting boundaries between "possessions". So far as boundaries on land are concerned, there is no particular problem of principle which arises. But as regards maritime possessions, there is a potential problem: any attempt to attribute by name a myriad small islands to one party or the other is inherently unsafe where, as off the Borneo coast at the end of the nineteenth century, there could be no assurance that *all* islands had been identified. Hence it was the common practice in such circumstances to identify sovereignty over small islands by adopting a straight line across maritime areas, and distribute sovereignty according to whichever side of the line an island might lie. This, manifestly, is what Article IV of the 1891 Convention did — fully in line with prevailing practice, and the geographical circumstances: it was the *only* way to be sure that the underlying objective of avoiding future disputes would be realized.

26. That that was the intention behind Article IV is evident from its very language. It refers to the line, which started at 4° 10' N on the coast, as being "continued eastward along that parallel". The whole notion of linear "continuation", particularly when reinforced by the word "along", does not embrace a line of only limited extent with a nearby terminal point, but signifies rather a line of indeterminate length.

27. Such a reading of the Convention — i.e., one which attributes sovereignty over islands — is the only way in which its purpose — dispute avoidance — could be achieved. The territorial limits of the possessions of the two parties were, as Indonesia has shown, uncertain. Both sides wanted to settle potential disputes once and for all. Giving Article IV a meaning which would leave undecided and still uncertain the attribution of small offshore islands must be rejected as inconsistent with that purpose. Coverage of potentially disputed islands was not some "optional extra" in the Convention, but an integral part of its main purpose.

28. And here it must be emphasized that Article IV is not just about the two Indonesian islands of Sipidan and Ligitan. It establishes a rule that benefited both parties to the Convention —

and still benefits both Parties to this present dispute. It is Article IV's maritime extent in the waters to the east of Borneo which confirmed Britain's — and now Malaysia's — title to those islands which lie to the north of the agreed parallel. If Article IV is deprived of maritime significance, then title to all those other offshore islands could again become an issue — the very thing which the parties wanted to avoid, in reaching a settlement of these territorial problems once and for all.

29. Moreover, it is clear that the parties to the Convention, in their negotiations, were well aware that the line they were negotiating would be a line which would extend out to sea. As Professor Pellet has shown, and as now shown on the screen (and it is at tab 23 in the judges' folders), the initial British proposal was for a line running eastwards from Broershoek, on the coast at 4° 10' N, and then south-eastwards through the channel between the islands of Sebatik and Nanoekan: this British line then turned east along the 4° parallel of latitude and continued for over 50 miles out to the open sea. While that particular proposed line was not in the end the line on which the parties agreed, the fact that that line was proposed, by Great Britain (Malaysia's predecessor in title), shows that a maritime line separating island possessions was in the parties' minds at the time.

30. Malaysia has argued that Article IV only takes the boundary as far east as the east coast of the island of Sebatik mentioned in it. But this is to read into Article IV a terminal boundary point which is not there in the text.

31. To see that this is so, one has only to compare the terms of Article IV with the language specifying the terminal point of the land boundary running westwards from its starting point on the east coast of Borneo. Article II described in some detail the course of the westward-running boundary, and then the relevant part of Article III stated that the boundary runs "[f]rom the summit of the range of mountains mentioned in Article II, to Tandjong-Datoe on the west coast of Borneo". Here, it is evident that, where the parties intended the boundary to terminate at a point on the coast, they found no difficulty in saying so. "Continues to" a specified point is very different from "continues along" a specified line. By saying, in relation to the eastern end of the line, that it "continues along" the specified parallel the parties must be taken to have said, not only in terms but also by comparison with what they said in Article III, precisely what they meant — the line was to "continue along" the parallel.

32. As already noted, that "continuation" had no fixed terminal point. Given the uncertainty over the attribution of island possessions in the area, and equally the resolve of the parties to avoid all future disputes of this kind, this made sense.

33. Such an indefinite line is fully in accord with international practice, as Indonesia has shown in its Counter-Memorial[4]. Nor is it in any way unusual that a line of attribution should extend so far as to dispose of sovereignty over islands some 50 miles from the relevant coast: as Indonesia also showed in its Counter-Memorial[5], two Conventions of special relevance to this case — the United States-Spain Peace Treaty of 1898, and the 1930 Anglo-United States Convention — do precisely that, in relation to islands well over 50 miles from the nearest mainland or even large island.

34. The lack of a fixed terminal point for the line does not, of course, mean that the line goes on forever, following the 4° 10' N parallel right round the earth: an indefinite line is not the same as an endless line. Like all treaty provisions, it has to be interpreted in its context, and in the light of the treaty's object and purpose. Seen in that light, the line continues only so far as necessary to settle definitively the whole problem of potentially competing Dutch and British territorial claims in the area: it continues so far as necessary to divide islands or territories whose attribution might give rise to future dispute. That certainly included going as far east as Ligitan — and for present purposes there is no need to consider whether there was any further particular point which the line needed to reach.

35. Malaysia, of course, has contended that the line established by Article IV stops at the east coast of Sebatik, and argues that that Article was only intended to deal with the fate of that island — in particular and in practice, its division.

36. That Article IV does deal with Sebatik is not denied by Indonesia. That Article IV stipulates that the 4° 10' N line passes "across" Sebatik, and divides that island along that line is equally not denied by Indonesia. But that, as Malaysia maintains, Article IV provides for a line which *only* deals with Sebatik, and goes *no further* than its east coast, *is* most emphatically denied

---

[4] Counter-Memorial of Indonesia, para. 5.44.

[5] *Ibid.*, para. 2.14.

by Indonesia. Nothing in the terms of that Article, nor in their context, nor in the objec[illegible]nd purpose of the Convention, supports such a view.

37. It is, of course, true that in negotiating the Convention the parties were very interested in the disposition of the island of Sebatik, and in the navigation rights around it. *If* one starts at the coast at 4° 10' N and goes eastwards, which is what Article IV is about, the first island one touches is Sebatik. So of course the parties had to deal with it there, in the immediate context of that Article, which covered the eastward extension of the line. Neither of the two broad options open to the parties and about which they had negotiated — that is, of attributing Sebatik wholly to Great Britain or wholly to the Netherlands — was acceptable to them. Instead, they decided to divide the island, and to use for that purpose the same parallel of latitude which they had decided would serve their other purposes in the area — and they needed to say so expressly, in order to make clear that the two other possible options were being rejected.

38. But dealing with the island in that way, in what is a subsidiary clause in the single sentence which constitutes Article IV, does not serve to place a limit on the principal thrust of the text: that is that the line "continue(s) eastward along" the stipulated parallel of latitude.

39. The terms of Article IV, while undoubtedly dealing with Sebatik, are equally appropriate for covering also other offshore islands in the area. I say "other" offshore islands for two reasons in particular.

40. The first is that Sebatik itself is of course an island. It cannot be assimilated to the mainland of Borneo — there is a stretch of water several miles wide between it and the mainland. That alone is enough to show that the Convention cannot be regarded as dealing only with the mainland of Borneo.

41. The second reason is that it must not be forgotten that Article IV was dealing with both Dutch *and* British islands in the area. As explained earlier, it is not just the islands lying to the south of the 4° 10' N line which were attributed to the Netherlands, but also those lying to the north which were attributed to Great Britain.

42. The truth is that Sebatik was dealt with in Article IV because, moving eastwards from the coast, it was an island of greater size and significance than others in the area, and because of its impact on navigation rights: for both of those reasons the parties paid considerable attention to it in

their negotiations. But there is nothing to suggest that it was their sole concern. They were settling their potential disputes over possessions to the east of Broershoek, and while Sebatik might have been the most immediate of their problems, the language they adopted covered also the *other* offshore islands, much smaller than Sebatik, in the general area which concerned them.

43. It is also highly relevant that the 4° 10' N line, as it continues eastwards from the coast, crosses only one island — Sebatik. That eastward continuation of the line therefore called for special treatment for only that one island, which is an added reason for it being dealt with in the way it was in Article IV.

44. That the 4° 10' N line as described in Article IV is said to continue "across" the island of Sebatik does nothing to establish that the parties' intention was that it should stop at the east coast of that island. "Across" is a term which, in its ordinary meaning, carries the meaning of "through and beyond" the object being crossed. The line, in being "continued eastward along" the stipulated parallel of latitude, does indeed cross the island. But that in no way implies that it stops there — and certainly does not do so when there are many other indications, not least of which is the parties' evident purpose of comprehensive dispute avoidance, that in using the words "continued eastward along" they meant exactly that. Those words are to be applied as they stand.

45. The Parties have expressed different views in their pleadings on a number of grammatical and linguistic points arising on the language of Article IV. Some of these are somewhat rarefied, and require careful consideration, and it is probably better to leave them as they have been set out in the pleadings[4]. At this stage only two points need be made.

46. The first is that the strictly grammatical analysis of Article IV supports Indonesia's view of its correct interpretation.

47. The second is that, simply on the basis of the plain structure of the text, the main clause of Article IV consists of the proposition that "the boundary-line shall be continued eastward along that parallel"; all the rest, about the island of Sebatik, is essentially a subsidiary part of the sentence, filling out part of its meaning, but not distorting the clear sense of the main clause, which takes the line out to sea along the 4° 10' N parallel.

---

[4] See Memorial of Indonesia, para. 5.43 *(g)* and *(h)*; Counter-Memorial of Indonesia, paras. 5.19-5.20, 5.23-5.26; Reply of Indonesia, paras. 2.17-2.19.

Explanatory memorandum map

48. While Indonesia is satisfied that the plain, ordinary, normal meaning of Article IV has the result for which Indonesia contends — namely, that the 4° 10' N line continues out to sea so far as necessary to fulfil the Convention's object and purpose — two matters associated with the Convention lend compelling support to Indonesia's view. These are the course of the debates in the Dutch Parliament when the Convention was being ratified, and the amendment which was introduced to the Contract of Vassalage with the Sultan of Boeloengan in order to give effect to the Convention. Both of these matters were officially known to the British Government, which raised no objection to either of them.

49. The Convention made special mention of the need for approval by the Dutch Parliament. Article VIII stipulated that the Convention had to be ratified, and that it would come into force three months after the exchange of ratifications. This exchange of ratifications was to "take place one month, or sooner if possible, after the said Convention shall have received the approval of the Netherland States-General". There was no equivalent reference to approval of the Convention by the British Parliament, so clearly particular importance attached to the need for the approval of the Dutch Parliament. This reflected the differing requirements of the Parties' constitutional procedures.

50. The Dutch constitutional practice called for the Dutch Government, in seeking the approval of the States-General, to submit to it a Bill — that is, a draft law — to that effect. The Bill had to be accompanied by an Explanatory Memorandum. This Memorandum had as its purpose to explain to the States-General the significance of a proposed treaty, and why its conclusion was in the interests of the Netherlands.

51. It was not the practice for such an Explanatory Memorandum to provide an exhaustive analysis of the treaty approval for which was being sought. Rather, the Memorandum would highlight those aspects of the treaty which were likely to be of principal interest to the States-General, such as its main purpose and achievements: in that way the members of the Dutch legislature would be made aware of what it was that they were being invited to approve. The main purpose of the Explanatory Memorandum was thus essentially as part of the political process of securing parliamentary approval for a treaty.

52. The Explanatory Memorandum for the 1891 Convention was of this kind. Given its geographical impact, it was accompanied by a map — which is being referred to here as the "Explanatory Memorandum map". It is a map which you saw earlier this morning, it is now on the screen, and a copy is also at tab 8 in the judges' folders.

53. As can be seen, the map depicted a number of lines. These were drawn in order to explain to the States-General what had been agreed in the Convention, as compared with various other proposals which had been on the table in the negotiations. Thus, as stated on the map itself, the map showed, by a blue line the boundary initially claimed by the Netherlands. It showed, as a yellow line, the boundary claimed by the British North Borneo Company (BNBC). A green line depicted the boundary suggested by the British Government. Finally, a red line showed the line finally agreed in the Convention.

54. Five things about these lines are to be noted.

(a) First, the area of the overlapping claims of the British North Borneo Company and the Netherlands — that is, the area between the yellow and blue lines — is quite extensive.

(b) Second, the compromise nature of the agreed line — the red line, particularly along the 4° 10' N parallel — is evident, dividing more or less equally, as it does, the overlapping claimed areas.

(c) Third, as already noted, the British Government's proposed line, the green line running south-east from Broershoek and between Sebatik and Nanoekan, is clearly shown to run out to the open sea: a seaward-extending line was clearly in the parties' mind at the time. In fact, this depiction extended less far out to sea than did the British proposal itself: as can be seen from the sketch-map already shown to the Court, and at tab 23 of the judges' folders, the British proposal turned east after passing south of Sebatik and then continued eastwards until well past Sipadan.

(d) Fourth, even more clearly, the line actually agreed in the Convention — the red line — runs eastwards from the coast at Broershoek, across the island of Sebatik, and continues a considerable distance out to sea, along the 4° 10' N parallel of latitude.

(e) Fifth, the same red line — the line agreed in the Convention — correctly reflects the distinction between Articles III and IV of the Convention, to which reference has already been

made. While the eastern, Article IV, line extends seawards, the western, Article III, line stops abruptly at the coast. It is the difference between a line running "to" a named place — Tandjong-Datoe, at the western end — and a line which is "continued eastward along" the specified parallel — 4° 10' N — at the eastern end.

55. In putting this map to the States-General the Dutch Government were clearly sensitive to the possible charge that they had conceded too extensive an area to the British. They explained, however, that their claimed area was not an unchallengeable claim, and that what they had achieved was, now, "a very accurately delineated boundary" instead of a "highly uncertain boundary": moreover, that accurately delineated boundary which "has now been accepted . . . obviates all difficulties in the future not only concerning the part of Borneo to which the dispute related but also concerning the whole island"[7]. The Government's intention to deal comprehensively with *all* possible sources of territorial friction in the area is apparent.

56. The red line on the Explanatory Memorandum map clearly bears out Indonesia's contentions in this present case. In the light of that map, it is simply impossible to maintain that the Dutch Government — and, as will be shown in a moment, the British Government — intended the agreed 4° 10' N line to stop at the east coast of Sebatik. Article IV of the Convention referred to the agreed line as one which "continued eastward along" the specified parallel of latitude, and the Explanatory Memorandum map shows just that — an abundantly clear illustration of what Article IV meant.

57. The map depicted all the relevant features needed to enable the States-General to decide upon the approval of the Convention. It did not need to show each and every feature of the area covered by it, and in particular every single one of the many small islands offshore the coast of Borneo. The map's purpose was to illustrate for the States-General the general effect of the Convention, for which there was no need for abundant cartographic detail.

58. Moreover, so far as concerns the small offshore islands, their precise location was at that time, and for that purpose, somewhat beside the point. What mattered was the course followed by the line of attribution at sea: islands south of that line were Dutch, and islands to the north were

---

[7] Full quotation at Memorial of Indonesia, para. 5.49.

British — without any need to identify them. It was the location of the line which was critical rather than the location of particular small islands, and the map depicted the location of the line with abundant clarity.

59. The map is of great importance as a contemporary exposition of the Dutch Government's views as to what was agreed in Article IV of the Convention. The Explanatory Memorandum, together with the accompanying map, was submitted to the States-General on 25 July 1891, that is just one month after the signature of the Convention. The contemporaneity of it as evidence of the Government's views cannot be doubted.

60. The ratification process with which it was associated is in any event an important act in relation to the treaty being ratified — "of vital importance", as the Court put it in the *Ambatielos* case[8]. This is particularly so where ratification is expressly stipulated in the treaty to be dependent upon the approval of that party's legislature. The map was an integral part of the Dutch Government's ratification process.

61. And moreover, the map was the basis on which the expressly required parliamentary approval of the States-General was given, thereby meeting the precondition established by Article VIII of the Convention.

62. In all, as public, contemporaneous and official evidence of what the Dutch Government intended and believed to be the effect of Article IV of the Convention, the map is compelling in the conclusions to be drawn from it.

63. Not only was the map known to the British Government by way of its public availability as part of the debates in the States-General, but it was also known officially to the British Government in the context of the 1891 Convention. The British Legation at The Hague followed carefully the ratification debates in the Dutch Parliament, and regularly reported developments back to the Foreign Office. Sir Horace Rumbold, the British Minister at The Hague, sent an official despatch back to the Foreign Office on 26 January 1892[9] with which he sent two copies of the map: and he drew specific attention to it. He said that it "seems to be the only interesting feature of a document which does not otherwise call for special comment". But while thus drawing

---

[8] Full quotation at Memorial of Indonesia, para. 5.51 *(a)*.

[9] Memorial of Indonesia, Ann. 81. See also Memorial of Indonesia, para. 5.54.

particular attention to the map, Sir Horace Rumbold, who was an active participant in the Anglo-Dutch dealings leading to the conclusion of the Convention and would have been familiar with the Convention's content, made no critical comment about the lines depicted on the map.

64. That official transmission of the map back to the Foreign Office elicited no response from the Foreign Office. There is no recorded comment on it; certainly, no indication of any dissent from its depiction of the agreed line. All that the Foreign Office did, apparently, was straight away to place the map in its official records, along with the Convention. In due course, in line with normal Government practice with official archives, the Convention and map were transferred to the Public Records Office — in effect, the official depository for publicly available State archives. And the Dutch Government did the same, and the map has been kept as part of the Netherlands State archives in The Hague.

65. It is thus clear that the Explanatory Memorandum map, which so clearly supports the Indonesian contentions in this case, was both officially known to the British Government at the time and in the context of the 1891 Convention, and was in no way whatsoever objected to by the British Government. The significance of this British official silence in the face of the Explanatory Memorandum map and the texts associated with it can scarcely be overstated. They demonstrated beyond question the Dutch Government's official interpretation of the 1891 Convention.

66. The British Government's knowledge, coupled with the absence of any indication of dissent from the depictions on it of the lines which were the very heart of the Convention, necessarily implies Great Britain's concurrence in the content of the map. That in turn involves irrefutable acquiescence in the depiction of the Convention line, such that all islands to the south of that line — and thus in particular the islands of Sipadan and Ligitan — belong to the Netherlands.

67. There are strong parallels between the circumstances surrounding the Explanatory Memorandum map, and those of the so-called "Livre Jaune" map which was in issue before the Court in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*[10] case.

68. There, there had been a Franco-British "Additional Declaration" of 21 March 1899: it defined a boundary line by verbal description, but without any map being attached to the

---

[10] *I.C.J. Reports 1994*, p. 6.

Declaration. A few days after the Declaration was adopted, the French Ministry of Foreign Affairs published the Declaration in a "Livre Jaune". Along with the text of the Declaration, the Ministry also published a map in the "Livre Jaune". That map was annexed to the official text of the Declaration kept in the Ministry's archives. The same map was attached to the *exposé des motifs* which accompanied the draft law submitted on 27 March 1899 to the French legislature authorizing ratification of the Declaration. The map was also published in the French press.

69. The map — like the Explanatory Memorandum map — was an official publication; it was contemporaneous with the Declaration it elucidated; it was related to the parliamentary approval process; it was publicly available. There can be no doubt that the British authorities were aware of it, but — as with the Explanatory Memorandum map — no protest or other dissent from it was made by the British Government.

70. In fact, the map differed in certain respects from the description of the boundary given in the text of the Franco-British Declaration. Nevertheless, the Court treated the map as an authoritative interpretation of the Declaration[11]. The present case is an even stronger example of a map being authoritative, since the Explanatory Memorandum map was entirely consistent with, and in no way different from, the text of the Convention. It shows the line agreed in the Convention and acquiesced in by Great Britain as a correct delineation of the agreed line.

71. The course of dealings between the Dutch and British Governments with regard to the Explanatory Memorandum map can also be seen in other, quite distinct, legally relevant ways. Indonesia has, in its written pleadings, drawn attention to three of these.

72. First, Indonesia has shown that the course of dealings between the two Governments involved in particular the official and contemporaneous publication of the map by the Dutch Government as part of its ratification process, and the failure of the British Government to dissent from the depiction of the agreed line on it, despite its knowledge of the map. Indonesia accordingly submitted in its Counter-Memorial[12] that those circumstances constituted an agreement relating to the 1891 Convention. As such it forms part of the context of the Convention within the meaning of Article 31, paragraph 2 *(a)*, of the Vienna Convention on the Law of Treaties.

---

[11] P. 18, para. 28; p. 30, para. 58; p. 37, para. 61; and p. 34, paras. 64-65.

[12] Paras. 5.31-5.34.

73. Second, and either additionally or alternatively, as Indonesia has submitted in its Counter-Memorial[13], the Explanatory Memorandum map constituted an instrument made by one of the parties in connection with the conclusion of the Convention — namely the Dutch Government, which made and published the map as part of the ratification process required by the Convention — and was accepted by the other party as an instrument related to the treaty — namely, Great Britain, through its knowledge of the map and the circumstances of its publication, accompanied by its failure to dissent from the depiction of the agreed line on the map. Accordingly, the map, as such an instrument, again forms part of the context of the Convention within the meaning of Article 31, paragraph 2 *(b)*, of the Vienna Convention.

74. Third, the agreement between the Netherlands and Great Britain which was constituted by the course of their dealings in connection with the map, has a further legally relevant aspect. As shown in Indonesia's Counter-Memorial, it is either, or both, a subsequent agreement between the parties regarding the interpretation of the Convention or the application of its provisions, or subsequent practice establishing the parties' agreement regarding its interpretation. As such, it must, by virtue of Article 31, paragraph 3, of the Vienna Convention be taken into account in interpreting the 1891 Convention, together with the context.

75. For all the foregoing reasons, it is apparent that the Explanatory Memorandum map is of great significance for this case, because of its particular and compelling relevance to the meaning of Article IV of the Convention. It fully bears out the meaning of that provision as derived from the actual language used:

— it was contemporaneous with the Convention;

— it was publicly available;

— it was an official Government document;

— it was prepared for use in the ratification process;

— it was submitted to the States-General; and

— it was known to — indeed was expressly drawn to the attention of — the British Government.

---

[13] Paras. 5.35-5.36.

76. And the British Government did nothing to indicate, in any way, that it dissented from the depiction on that map of the line which was stated on the face of the map to have been the line agreed in the Convention. A clearer case of acquiescence or implied agreement is hard to imagine.

77. Yet the map's significance does not end there. As was said at the outset, it was prepared and submitted to the States-General as part of the ratification process of the 1891 Convention. It was, together with the Explanatory Memorandum of which it formed part, the basis for the parliamentary debates on the ratification of the Convention.

78. Those debates made one thing abundantly clear. The Dutch Government was commending the Convention to the States-General, whatever niggling doubts the members of the legislature might have about it, on the grounds of "the advantages of the arrangement come to, as settling for good and all the entire question of the boundaries between Dutch and British protected territory in Borneo"[14]: or as put by the Government in another part of the debate, the Government had exercised its duty to ensure that "the rights in relation to local rulers both in Borneo itself and on the neighbouring smaller islands are regulated in such a way that difficulties with other Powers need never be feared with regard to their respective claims"[15].

79. Previous uncertainty was being replaced by certainty, *across the board* — "for good and all", future "difficulties . . . need never be feared". And that certainty was being commended to the States-General, and was accepted by it, on the basis of the map forming part of the Explanatory Memorandum. The Court itself has said of another boundary settlement (in the *Temple of Preah Vihear* case), that it thought it

> "legitimate to conclude that an important, not to say a paramount object of the settlements of the 1904-1908 period (which brought about a comprehensive regulation of all outstanding frontier questions between the two countries), was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality"[16].

The same is true of the 1891 Convention.

---

[14] Memorial of Indonesia, para. 5.56.

[15] *Ibid.*, para. 5.61.

[16] *I.C.J. Reports 1962*, pp. 34-35. For the full quotation see Memorial of Indonesia, para. 5.59; and also para. 5.60.

Amended Contract of Vassalage

80. The Explanatory Memorandum does not stand alone as contemporaneous evidence of the Netherlands understanding of what the 1891 Convention, and in particular Article IV, meant. That Convention entered into force in 1892. In 1893 the Dutch authorities secured an amendment to the Contracts of Vassalage of 1850 and 1878, setting out the territorial extent of Boeloengan. Just one year after the entry into force of the Convention, the definition was amended to read, so far as relevant, as follows:

> "the islands of Tarakan and Nanoekan, and that portion of the Island of Sebitik, situated to the south of the above boundary-line described in [a certain way] . . . belong to Boeloengan, as well as the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line . . ."[17].

The final words of this text — the reference to islands "so far as they are situated to the south of the boundary-line" — show that the Dutch Government regarded the effect of the 1891 Convention as being to establish, in relation to islands, a line of territorial attribution extending out to sea.

81. This new text was officially communicated to the British Government on 26 February 1895. The text, with its clear implication as just stated, was in no way challenged by the British Government. Once more, it confirmed — by further silence — the acquiescence in the Explanatory Memorandum map which it had demonstrated by its initial silence.

1915 and 1928 Anglo-Dutch agreements

82. The 1891 Convention, central importance though it is, is not the only Anglo-Dutch treaty relevant to their common boundary in Borneo, and a brief word needs to be said about two other treaties in this context — particularly in so far as they relate to boundary maps. What follows will only be "brief" because, for the reasons which Indonesia has explained fully in its written pleadings[18], the two treaties are essentially irrelevant to the issues arising in this case.

83. By way of background, it is to be noted that the 1891 Convention itself envisaged, in Article V, that it might be necessary to determine with exactitude the boundary line described in Articles I to IV of the Convention. This is in no way surprising: Articles I to IV are very brief — just five sentences altogether — but they describe a boundary stretching for something over

---

[17] Memorial of Indonesia, para. 5.62.

[18] See Memorial of Indonesia, para. 5.65; Counter-Memorial of Indonesia, paras. 5.97-5.118; Reply of Indonesia, paras. 2.37-2.50.

1,200 km overland, through mountainous and heavily forested terrain about which the parties admitted that they knew very little.

84. Accordingly, pursuant to that provision, in 1915 and 1928 the parties concluded further agreements, specifying the land boundary in particular areas. Each of those agreements annexed maps, delineating the more exact boundary lines determined in the area covered by the agreement in question. The 1915 agreement covered the island of Sebatik and a short distance into the mainland of Borneo; the 1928 agreement covered a short distance much further in the interior.

85. These two stretches are indicated by the sketch-map now on the screen, and at tab 28 in the judges' folders: it is a sketch-map which was included in Indonesia's Counter-Memorial as Annex 26. As can readily be seen, the two agreements dealt with only a very small part of the total land boundary between the Dutch and British territories in Borneo — in fact, only about 20 per cent of the boundary.

86. This shows clearly the very limited extent of those two agreements. They, and their annexed maps, are very relevant *to those limited stretches of land boundary*. They say nothing whatsoever about the other stretches of the line agreed in the 1891 Convention.

87. Malaysia has sought to argue that the fact that the 1915 agreement and its map do not show a line extending out to sea to the east of Sebatik means that no such eastward and seaward extension of that line was agreed in Article IV of the 1891 Convention. But this is manifestly not correct. The 1915 and 1928 agreements and their maps did not cover some 80 per cent of the land boundary, but that does not mean that the line established by the Convention did not continue across that other 80 per cent: *of course* it did. The correct position is that the maps annexed to the 1915 and 1928 agreements are wholly irrelevant to any other stretches of the Convention line, whether to the west or the east of the limited stretches those agreements were dealing with.

88. Moreover, one must ask what a Commission charged with what was essentially a task of demarcation could do in the way of demarcating a line at sea, as prescribed by Article IV? There is neither a practical possibility of such a physical demarcation at sea nor, more importantly, any need for it — by establishing that the line followed a parallel of latitude, Article IV of the Convention said all that was needed: that parallel can easily be identified at sea; nothing else is needed.

89. Those two later agreements simply do not address the issue which is at the centre of this case. They do not say anything about the seaward extension of the particular parallel of latitude prescribed by Article IV of the Convention — which, the Court will recall, requires that the line be "continued eastward along that parallel", crossing as it does so the island of Sebatik. The maps annexed to those two agreements are similarly silent on that issue. As agreed maps, they had an immediate binding force which the Explanatory Memorandum map only acquired by virtue of its publication and Great Britian's subsequent acquiescence; but in no sense can they be said to prevail over the Explanatory Memorandum map, and the agreement to which it gave rise, in relation to stretches of the Convention line which were beyond the reach of the 1915 and 1928 agreements.

90. That Explanatory Memorandum map, for all the reasons which have been explained both this afternoon and in Indonesia's written pleadings, is compelling supporting evidence for Indonesia's interpretation of Article IV of the 1891 Convention. That interpretation follows both from the text of that Article and from the object and purpose which the parties had in mind, namely the wish to deal comprehensively with territorial issues in the area of their mutual concern so as to put an end, once and for all, to *all* potential sources of territorial friction, whether on the mainland or offshore.

91. Mr. President, and Members of the tribunal, that brings me to the end of my presentation of Indonesia's arguments concerning the meaning and significance of the 1891 Convention. I am grateful to the Court for the courtesy and patience with which it has heard me. I now invite you, Mr. President, to give the floor to Professor Soons, to begin Indonesia's presentation of events occurring after the 1891 Convention. Thank you very much, Mr. President.

Le PRESIDENT : Je vous remercie beaucoup, sir Arthur Watts. Je donne maintenant la parole au professeur Alfred Soons.

Mr. SOONS:

Confirmation of Dutch title to the islands post-1891

Introduction

1. Mr. President, Members of the Court, my task this afternoon will be to show that the title to Pulau Sipadan and Pulau Ligitan, allocated to the Kingdom of the Netherlands by the 1891 Anglo-Dutch Convention, as just explained by Sir Arthur Watts, was confirmed in the subsequent years by acts by both parties to the Convention. These acts involve: (1) the publication of maps by the BNBC, and (2) naval patrols around the islands by the Dutch, including one highly significant operation by the destroyer *Lynx* and its seaplane, involving even landing on the island of Sipadan. In addition, I will deal with the significance of the internal Dutch deliberations in the 1920s on the delimitation of the territorial sea off Sebatik Island, an issue which had been raised by Malaysia in its Counter-Memorial and which Indonesia will be happy to address since it only underscores the Indonesian position with respect to the nature of the 1891 Convention line.

Maps issued by Stanford's Geographical Establishment, the BNBC's official cartographer

2. First, I will address the maps issued by Stanford's Geographical Establishment in London. Shortly after the conclusion of the 1891 Convention, in the period 1894-1904, Stanford published three maps which clearly indicate that the British viewed the 1891 Convention line as extending offshore, thus leaving islands situated to the north of the line to the State of North Borneo and those to the south of the line to the colony of the Dutch East Indies. Before discussing these maps, however, I want to say a few words on the status of Stanford's Establishment as the official cartographer of the BNBC. Some of the maps issued by Stanford's can incontestably be regarded as official maps issued on behalf of the State of North Borneo, and as a consequence they have a particular value in establishing the views of one of the parties to the Convention.

3. Already in 1888 Stanford had prepared two maps of the BNBC territory specifically for the company. These maps were used by the British in formulating their positions advanced during the negotiations for the 1891 Convention. Indonesia has quoted in its Memorial from a letter from the British North Borneo Company to the British Foreign Office dated 8 March 1889. With this letter, the BNBC provided at the request of the Foreign Office: "two copies of a Map carefully *prepared under the direction of the Court of Directors*, showing, so far as possible in the present state of geographical knowledge, the limits which they claim in Borneo" (emphasis added)

(Memorial of Indonesia, Vol. 2, Ann. 46). The two copies referred to in this letter have been included in Indonesia's Map Atlas, as maps 3 and 4, and they were shown this morning by Professor Pellet. As you can see from the title of the map now shown on the screen, which is map 3 of our Map Atlas, it was prepared by Stanford for the BNBC in 1888, as an extract from an already existing basemap. The map shown is included in the judges' folders, under tab 25; that probably makes it easier to read the title.

4. As Indonesia has mentioned in its Memorial (para. 6.55), British archival sources show that, following the conclusion of the 1891 Convention, Stanford's Geographical Establishment continued to act as the official cartographer of the BNBC, the Government of the State of North Borneo. On 26 April 1892, for example, the Governor's Office of the BNBC in Sandakan sent correspondence to BNBC Headquarters in London enclosing two sets of plans regarding the mapping of portions of the BNBC territory with the request that these plans be forwarded to Stanford for their maps (Memorial of Indonesia, Vol. 3, Ann. 91). On 8 July 1898, the BNBC Commissioner of Land in Sandakan sent correspondence to London indicating the results of further surveys of the BNBC's territory. I quote from the Commissioner's letter, which you will find in the judges' folders under tab 29: "I hope these 3 tracings and map will be sent to Stanford to place the details on our Territorial Map" (Memorial of Indonesia, Vol. 3, Ann. 92).

5. From this correspondence it is quite clear that the BNBC looked to Stanford for preparing their official maps. This is not disputed by Malaysia in its written pleadings.

6. Mr. President, Members of the Court, I now turn to the maps published by Stanford shortly after the conclusion of the 1891 Convention. Clear confirmation that the British viewed the 1891 line as extending offshore, leaving Pulau Sipadan and Pulau Ligitan on the Dutch side of the line, is provided by a map entitled "Borneo" published by Stanford in 1903. As can be seen from this map, included in your folders under tab 30, the legend of the map explains that the provinces of the BNBC are separated by red lines on the map. The boundaries of the BNBC's provinces can be seen to extend seaward, thus including various offshore islands. You can now see this in more detail. In particular, the southern offshore boundary of the Elphinstone province continues into the sea and coincides with the course of the 1891 line, leaving the island of Sipadan to the south, on the Dutch side of the boundary. To the east of Sipadan the map shows another feature, unnamed,

which Malaysia alleges represents [illegible] (Counter-Memorial of Malaysia, para. 5.10). The feature is located just to the north of the line. We do not know if this was indeed intended to represent Ligitan. Given the limited geographical knowledge of the area at that time it is very well possible that Ligitan was incorrectly situated on the map. But that matters very little for our purposes: what matters is the presence of the line at sea, and the fact that it follows the 4° 10' N parallel of latitude.

7. The 1903 Stanford map is direct evidence of what the BNBC considered the limits of its territory following the conclusion of the 1891 Convention. Stanford's status as effectively the official cartographer for the BNBC underscores the important evidentiary value of the map.

8. Apart from this particular map there were other maps published by Stanford shortly after the conclusion of the 1891 Convention which, not surprisingly given Stanford's status as just explained, show the function of the 1891 Convention line. The first was a map in Stanford's *London Atlas of Universal Geography*, edition of 1894. It was the first map of the region published by Stanford after the conclusion of the 1891 Convention, and clearly took account of what was agreed in that Convention. I will show you first the 1887 edition of the map, to illustrate the difference. It is in the judges' folders at tab 31. No lines extending beyond the coast are here to be seen. Now you see the 1894 edition of the same map. We focus on the relevant area of the map. You will find a copy in your folders at tab 32. It is significant that the southern limits of British North Borneo can now be seen to extend out to sea from the island of Sebatik along the 4° 10' N line of latitude to a point well to the east of Sipadan and Ligitan. There can be no other explanation for this southern limit than the fact that it reflected the territorial allocation between British North Borneo and the Netherlands East Indies agreed upon in the 1891 Convention. British possessions were clearly seen to be limited to areas lying to the north of 4° 10' N latitude.

9. The 1904 edition of Stanford's *London Atlas of Universal Geography* contains a map of the region which is similar to the 1894 map. This map is included in Indonesia's Reply, Volume 2, Annex 26.

10. In conclusion: The maps published by Stanford clearly show the same line as the one on the Explanatory Memorandum map; the BNBC recognized that the southern limits of its territory east of the island of Sebatik coincided with the prolongation of the 4° 10' N parallel of latitude

established by the 1891 Convention to a point lying well east of Sipadan and Ligitan. Both islands were clearly recognized as belonging to Dutch Borneo.

Dutch exercises of State functions: the activities of the Royal Netherlands Navy

11. Mr. President, Members of the Court, I now turn to the evidence available from the practice of the Netherlands to the effect that, subsequent to the conclusion of the 1891 Convention, it regarded Sipadan and Ligitan as part of the colony of the Netherlands East Indies. One of the most authoritative instances of evidence of confirmation of sovereignty over territory is the undisputed conduct of policing activities in the territory. Such evidence is indeed available in this case. A highly relevant example of such practice subsequent to the conclusion of the 1891 Convention is provided by the policing activities carried out in the area around Sipadan and Ligitan by a ship of the Royal Netherlands Navy for the purpose of protecting the coastal population against acts of piracy and robbery by people originating from the Sulu archipelago.

12. Indonesia has in its Counter-Memorial shown that the Dutch Navy, since the end of the nineteenth century, periodically patrolled the seas around the islands located off the north-east Borneo coast which were considered to be under Dutch sovereignty (Counter-Memorial of Indonesia, para. 7.47). Indonesia submitted a list of Dutch warships which over the years had been present off the coast of north-eastern Borneo, which shows that the Dutch Government cared about the security of this part of its possessions (Counter-Memorial of Indonesia, Vol. 2, Ann. 32). We mentioned the example of HNLMS *Koetei*, which was present in the area in 1910. This ship's logbook contains an entry for 30 September 1910 specifically mentioning cruising near Sipadan and Ligitan (Counter-Memorial of Indonesia, Vol. 2, Ann. 33). The Malaysian dismissive response to this evidence is perplexing (Reply of Malaysia, para. 3.25). It refers to irrelevant occurrences like that the ship three days earlier near Sibetik Island had arrived at the territorial sea boundary with North Borneo, and later paid a visit to Lahad Datu, a town in North Borneo. The important point, however, is that the ship did not stay close to the mainland coast and Sibetik, but that it continued to Sipadan and Ligitan: those islands too were of interest to the Dutch warship. It sailed close to Sipadan: the logbook mentions a distance of two miles. The ship was not surveying, but patrolling.

13. Another governmental activity carried out in this area by the Dutch is hydrographic surveying. The Dutch Government has always extended its surveying activities to the area around Sipadan and Ligitan, as evidenced by the HNLMS *Macasser*. As mentioned in our Memorial, in October and November 1903 this ship surveyed the waters around Sipadan and Ligitan (Memorial of Indonesia, para. 5.40). Malaysia also mentions this activity in its Memorial (Memorial of Malaysia, para. 7.14), but its interpretation of the report of the commanding officer of the *Macasser*, namely that he appeared to treat all islands mentioned (including Sipadan and Ligitan) as being part of British North Borneo, is unfounded. For surveying purposes it is normal to treat all maritime features in a purely geographical, and politically neutral, way. Rather, the real significance of this report is, again, that it shows Dutch activities in the area, demonstrating that the Dutch had interests there: the Dutch warship was there because of the need to survey the waters surrounding Dutch islands. This survey of the *Macasser* resulted in the publication in 1905 of chart No. 59 by the Netherlands Hydrographic Office. Updated editions of this chart have subsequently been issued several times, based on new data collected by the Dutch Navy. This shows that the Dutch Government continued to regard it as its responsibility to ensure the safety of navigation in this area by maintaining updated nautical charts.

14. Again, the Malaysian response does not convince. In its Reply, at paragraph 3.24, it refers to the charts produced by the Dutch Hydrographic Office as "maps". Perhaps that explains why it remarks that the Dutch-British boundary line on this chart stops at the east coast of Sebatik. Nautical charts, however, do not identify the State to which islands belong. An extended allocation line into the sea could thus not have been expected here.

15. But, Mr. President and Members of the Court, the most striking example of Dutch acts of sovereignty is provided in the detailed and indeed fascinating account by the commander of the destroyer HNLMS *Lynx*, Lt. Cdr. Smit. This warship, carrying a seaplane aboard, highly effectively patrolled the area in November and December 1921. Indonesia has submitted an excerpt of the report by the ship's commander to the vice-admiral commanding the naval forces in the Netherlands East Indies (Memorial of Indonesia, Vol. 4, Ann. 120), who had provided the instructions to the commander. From this report, which you will find in your folder under tab 33, it can be seen that the Dutch authorities considered both Sipadan and Ligitan to be islands under

Dutch sovereignty, whereas other islands situated north of the 1891 Convention line were considered to be British.

16. I will first briefly go through the report of the commander of the *Lynx*. Thereafter I will deal with the views expressed by Malaysia in its written pleadings. In the meantime you see behind me on the screen a picture of the *Lynx* with its seaplane hoisted on its stern during one of its patrols in the Netherlands East Indies. The second picture shows the *Lynx*, close to shore, with the seaplane next to it in the water.

17. In essence, the *Lynx* commander's report shows that he carefully avoided venturing within the three-nautical-mile territorial sea limit of islands under British sovereignty, such as Si Amil, which lay north of the 4° 10′ N latitude line, the 1891 Convention line. But because Sipadan and Ligitan both lay to the south of that line, the *Lynx* and the seaplane did visit them. Moreover, as we shall see the BNBC authorities were aware of the activities of the *Lynx*. The ship's commander immediately informed the BNBC authorities of his observations concerning the whereabouts of the pirate fleet. The BNBC authorities did not raise any objection to the activities of the *Lynx*.

Mr. President, I was wondering whether, since the next section of my presentation would take somewhat more time, this would be an appropriate natural breaking point. Otherwise I would like to continue for about seven or eight more minutes.

The PRESIDENT: Professor Soons, I think you may finish with the *Lynx* operations for the further seven, eight minutes you mentioned.

Mr. SOONS: Thank you very much.

18. The *Lynx* stayed in the area from 20 November till 5 December 1921. It operated out of the oil port of Tarakan. The first days it patrolled along the coast, in the various river estuaries, up to the territorial sea boundary off Sebatik. Thereafter it made some patrols further offshore: and these are most significant for us.

19. The report of the commander contains the following highly relevant entries:

(i) "25 November 1921: HNLMS *Lynx* then weighed anchor at 1800 hrs and steamed away. After passing the lightship the lights were doused and we set sail for the island of

Sipadan. We did not meet any praus during the night of 25 to 26 November and arrived at Sipadan at 0600 hrs. Sipadan lies approximately 20 miles from Si Amil. An armed sloop was sent ashore for information, but returned empty-handed."

The map now on the screen shows this patrol of the *Lynx* to Sipadan, which included the sending of an armed sloop ashore.

(ii) From the report of the commander of the *Lynx*: "The plane was launched at 1000 hrs and took off easily. The plane flew via Sipadan to the 3-mile limit off Si Amil."

The map now on the screen shows this reconnaissance flight of the seaplane. The dark blue area around the North Borneo island of Si Amil is the 3-mile-limit of its territorial sea, which the plane clearly respected. But on its trip it traversed the airspace of Sipadan.

(iii) "On Sunday, 27 November at 1830 hrs I received your encoded wireless telegram sent on 25 November at 0940 hrs which reads after decoding: 'With reference to your wireless telegram, English authorities will be warned without delay. Keep fleet under surveillance. As soon as they leave English territorial waters, seize them and take the Raja's prau to Tarakan for investigation of the incident responsible for *Lynx's* presence'..."

(iv) "28 November 1921: *Lynx* left the roads of Tarakan to sail to Si Amil to try to catch Raja Panglima Djumang of Sulu outside British territorial waters."

(v) "The plane made another flight to Si Amil that afternoon, where it discovered the pirate fleet of 40 praus under the leadership of Raja Panglima Djumang. The plane landed outside the 3-mile limit..."

This m[illegible] shows this second flight by the seaplane. Again, it respected the territorial sea limit of the island belonging to North Borneo.

(vi) "30 November 1921: Weighed anchor at 2330 hrs, and steamed to Sipadan where no praus were seen. Sailed from there on 1 December to the 3-mile limit on the east coast of Si Amil, where we found 40 praus fishing on the reef. It is gradually becoming clear that they have formed a settlement on Si Amil. Steamed away from Si Amil again in a southerly direction and sailed from Ligitan to South Sibetik."

The map now shows the second patrol of the *Lynx*, respecting the territorial sea of Si Amil.

(vii) "We launched the plane on 1 December at 0900 hrs., after which it made a tour to Ligitan heading to south Sibetik . . ."

(viii) "The plane then flew on from Ahus to the east of Mandul and from there directly to the island of Sipadan and the nearby Si Amil, where the fleet of 40 proas were still fishing. Received a wireless telegram at 1100 hrs through Tarakan from the Resident in Banjermasin as follows: 'Regarding your signal yesterday, if pirates outside our territory and no threat to settlements expected, no further measures from *Lynx* needed'".

This map, finally, shows the third flight of the seaplane. It flew over Ligitan and Sipadan, but respected the territorial sea of Si Amil. All five maps just shown are included in the judges' folders, under tabs 34 and 35.

20. The operations of the *Lynx* and its seaplane make it abundantly clear that Pulau Sipadan and Pulau Ligitan were considered to be under Dutch sovereignty. The warship entered the territorial sea of Sipadan twice, and an armed patrol even went ashore. The seaplane flew over Sipadan and Ligitan. Since there does not exist, and did not exist at that time, a right of overflight within the territorial sea of a foreign State, the seaplane could only have entered the airspace over the islands if it considered them Dutch territory. These actions should be contrasted with those of the *Lynx* and its seaplane when near islands north of the 1891 Convention line: their territorial seas were scrupulously respected. In Indonesia's view, these operations could serve as a classroom example of how territorial sea limits are respected during maritime law enforcement operations. This may be, then, an appropriate break time. Thank you.

Le PRESIDENT : Je vous remercie beaucoup. La Cour va suspendre pour une dizaine de minutes.

L'audience est suspendue de 16 h 30 à 16 h 40.

Le PRÉSIDENT : Veuillez vous asseoir. L'audience est reprise et je donne la parole au professeur Soons.

Mr. SOONS: Thank you, Mr. President. After having described in some detail the operations of the *Lynx* and its seaplane before the break, I now turn to Malaysia's treatment of the *Lynx* operations.

21. Malaysia, in its Counter-Memorial and Reply, shows its embarrassment with this crystal clear display of the Dutch views on the extent of its territorial possessions based on the 1891 Convention. It simply dismisses the significance of the *Lynx* expedition. It does not answer the Indonesian arguments, but merely states that the incident has nothing to do with Dutch territorial jurisdiction over any islands whatsoever. Presumably because the *Lynx* was engaged in combating piracy, as stated in paragraph 3.26 of Malaysia's Reply? Apparently Malaysia is of the view that a warship may anchor in a foreign territorial sea and put a boat ashore on a foreign island, to seek information of the whereabouts of suspected pirates, without prior permission from the coastal State's authorities. A foreign warplane may fly over islands also without prior permission. Perhaps Malaysia will better explain its views later this week. Indonesia submits that also at that time colonial powers were jealous of their territorial jurisdiction. Especially in border areas they would be alert. The BNBC authorities would certainly have protested if they had been of the opinion that the Dutch operations had trespassed on their territory.

22. Finally, Malaysia dismisses the *Lynx* incident as insignificant because it was the only such reported case of display of Dutch policing activities in the area. It is true that the report of the commander of the *Lynx* is the only such report that Indonesia has been able to retrieve from the colonial archives in the Netherlands or, for that matter, Indonesia. The problem here is that such reports normally would never have reached the archives in the Netherlands. These reports are routine matters. They stayed in the East Indies, where they were kept in the archives of the Commander Naval Forces, Netherlands East Indies. These archives, at least for this period, do not exist anymore; they were in all probability destroyed in March 1942 during the invasion of the Dutch East Indies. The only reason why this particular report, as an exception, was available in the archives in the Netherlands is that it was sent to The Hague by the Governor-General of the Netherlands East Indies in December 1922 as an annex to a letter dealing with the issue of the delimitation of the territorial sea between the Netherlands East Indies and the State of North Borneo off Sebatik island, a matter which I will discuss in a moment (see Counter-Memorial of

Malaysia, Vol. 2, Ann. 4). But at this point I should already stress that it appears from the record of these internal deliberations in the Netherlands and the Netherlands East Indies during the 1920s that not a single Dutch official involved questioned the correctness of the *Lynx* commander's actions during the patrol in November/December 1921.

23. In connection with the Malaysian remark on the paucity of Dutch acts of sovereignty over Sipadan and Ligitan, such as the *Lynx* operations, it should be stressed that the nature and intensity of the control over territory required from a State by international law for it to uphold its sovereignty in the face of possibly competing claims varies according to the nature of the territory in question. We have referred to pronouncements to this effect in international arbitral and judicial decisions in paragraph 7.52 of our Counter-Memorial. The Dutch activities with respect to these very small, remote and uninhabited islands must be considered more than sufficient for this purpose.

24. In conclusion, the operations of the *Lynx* show that its commander, following his instructions from the highest naval authority in the Netherlands East Indies, scrupulously respected the 1891 Convention line as allocating territorial sovereignty over the offshore islands in the area. In particular, the landing on Sipadan of armed Dutch naval personnel, the visit to the vicinity of Ligitan and its repeated overflying by the seaplane constituted acts *par excellence* of the exercise of governmental authority with respect to the islands. Is law enforcement not the clearest display of State functions? These actions therefore confirm the title to Sipadan and Ligitan vested in the Netherlands by virtue of the 1891 Convention.

Significance of the internal Dutch deliberations on territorial sea delimitation

25. Mr. President, Members of the Court, I now come to my third and last point to be addressed in this presentation. Another issue which Malaysia and Indonesia have been discussing in the written pleadings concerns the significance of the internal deliberations within the Dutch Government in the 1920s relating to the possible delimitation of the territorial sea on the east coast of Sebatik island. These discussions and their outcome are in full conformity with the views expressed by Indonesia about the meaning of the 1891 Convention line. In dealing with this

matter, Malaysia has been confusing the question of delimitation of the territorial sea, which is not the subject of the present dispute, with the question of title to territory.

26. Indonesia was fully aware of the file in the Dutch archives dealing with this issue since, as I just mentioned, the report of the commander of the *Lynx* was part of that file. But it is essentially irrelevant for our case, as I will explain. Contrary to what Malaysia seems to imply, Indonesia has not suggested that the 1891 Convention line was from the outset intended also to be, or in effect was, a maritime boundary in the sea area east of the island of Sebatik. Rather, as submitted by Indonesia in its Memorial and Counter-Memorial, the line was considered to be an allocation line: land areas, including islands, located to the north of 4° 10' N latitude were henceforth considered to be British, and those lying to the south were Dutch. That such land territory and islands generate a territorial sea which may require delimitation is another matter.

27. At the time of the conclusion of the 1891 Convention and the internal Dutch deliberations during the 1920s, the only maritime jurisdictional zone that was generated by sovereignty over land was the territorial sea, extending to a maximum breadth of three or possibly four nautical miles measured from the baselines of the coastal State. In cases of adjacent coastal States, and of opposite coastal States where the distance between their respective coasts was less than 6 nautical miles, a delimitation of the respective territorial seas would in principle be called for. This was the case of the area east of Sebatik island, where, as the result of the 1891 Convention, the land boundary met the sea on the eastern shore of the island and thus the question arose how exactly the territorial sea boundary east of that point should be drawn. In addition, depending upon the course of this boundary, the delimitation with the territorial sea of the opposite mainland — Batoe Tinagat — might have come into play since Cowie Bay, the local area, is less than 6 miles wide.

28. The internal Dutch discussions are accurately described in Malaysia's Counter-Memorial (Counter-Memorial of Malaysia, paras. 4.10-4.18). The discussions focused on the various options available in these particular circumstances. One option was to consider the 1891 Convention as *also* constituting offshore — that is, up to 3 nautical miles — a territorial sea boundary. The other option was to apply the applicable rule of general international law: that would prescribe a line drawn perpendicular to the coast at the terminus of the land boundary.

29. On the screen you can see now a sketch which was used in the internal Dutch debates; it was included by Malaysia in its Counter-Memorial, as insert 5 at page 76. Malaysia also produced its own sketch, as insert 6 at page 77, which perhaps is clearer: it is now shown on the screen, and is included in the judges' folder under tab 36. I need to point out here that the legend of this sketch mixes up the two lines; the red and black colours in the legend, or on the sketch, should be reversed. The black line on the sketch — A-D — is obviously not the prolonged land boundary, but a line perpendicular to the coast. The red line — A-B — corresponds to the prolonged land boundary. Incidentally, when you look at this sketch you will notice how negligible the area involved in fact was; it was truly a very minor issue.

30. The internal Dutch discussions reveal that differing views were expressed by various government officials on the preferred option, but the final view expressed in September 1926 by the Minister for Foreign Affairs, who had the final authority in such matters, was that the perpendicular line should apply and that it was not opportune to raise the matter with the British Government. And so it was decided. The matter was never raised with the British by the Dutch Government.

31. According to Malaysia, the discussions during 1922-1926 show that "the Dutch colonial officers themselves did not at the time think a maritime boundary had been established by the 1891 Convention". That conclusion is correct, and is entirely consistent with Indonesia's view that the 1891 Convention line, extending to the east of Sebatik Island, was an allocation line. It should be stressed here again that any maritime boundary at the time could only have been a territorial sea boundary extending no more than 3 miles from the coast. But the 1891 line east of Sebatik had a different purpose. It represented a line separating territorial possessions, and because there were no insular possessions lying within 3 miles of the coast of Sebatik the 1891 line of attribution was represented as a straight line along the 4° 10' N parallel of latitude. Consequently, there is nothing incompatible between the 1891 Convention line and the Dutch internal discussions as Malaysia tries in vain to imply.

32. It is also important to point out that the internal Dutch discussions of 1922-1926 were entirely restricted to the territorial sea boundary off Sebatik Island and did not involve the islands of Sipadan and Ligitan. This can easily be explained by the fact that in the case of those two

islands no territorial sea delimitation questions arose since they are located at distances of more than 6 miles from the nearest North Borneo islands of Kapalai and Dinawan.

33. In conclusion: the internal Dutch debates on the territorial sea delimitation off Sebatik Island do not contradict the position taken by Indonesia in the written pleadings in this case about the nature and significance of the Convention line, which is that it allocates title to islands located beyond Sebatik: to the north of the line, title belonged to North Borneo, and to the south, to the Netherlands.

34. Mr. President, Members of the Court, I thank you again for your attention. Mr. President, may I ask you to call on my colleague, Mr. Bundy, who will continue Indonesia's presentation.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole à M. Rodman R. Bundy.

Mr. BUNDY: Merci, Monsieur le président. Mr. President, Members of the Court:

THE DEFECTS IN MALAYSIA'S TREATY-BASED CHAIN OF TITLE

1. It is, as always, a great honour to appear before this distinguished Court on behalf of the Republic of Indonesia in this important case. Before turning to the substance of my remarks, Mr. President, I would also like to pay tribute to a close friend and colleague, Keith Highet, who was a member of Indonesia's team when this case was started, and would have handled the materials and the part of the case that I shall address this afternoon. Sadly, Mr. Highet is not with us today.

A. Introduction

2. Up to this point, Indonesia's presentation has focused on the events of the late nineteenth and early twentieth centuries on which its title to Ligitan and Sipadan is based. My task this afternoon is to shift the focus from these considerations to the elements of Malaysia's case. Now, as the Court will be aware, Malaysia's claim to Ligitan and Sipadan is based on two separate, but by no means consistent, strands of argument.

3. The first — the so-called "treaty-based" argument — is grounded on the proposition that Malaysia acquired title to Ligitan and Sipadan by virtue of a series of legal grants from each of its

predecessors in interest. Those predecessors in interest, in chronological order, were the Sultan of Sulu, Spain, the United States and Great Britain (Counter-Memorial of Malaysia, para. 2.2 and Reply of Malaysia, para. 5.1).

4. The second Malaysian thesis is based on the contention that, regardless of where the treaty-based title lies, Malaysia still possesses sovereignty over the islands as a result of what is claimed to be a long-standing administration of the islands.

5. I shall be addressing the first of these arguments — the treaty-based claim and tomorrow my colleague and friend, Professor Pellet, will rebut the Malaysian argument based on alleged British and Malaysian administration over the islands. As Indonesia will show, neither of Malaysia's arguments are well-founded. And neither, particularly when viewed in the light of the 1891 Convention and the *mutual* conduct of the Parties, can displace what was Dutch, and what is presently Indonesian, title over the islands.

B. Malaysia's claim that title passed from the Sultan of Sulu to Spain, thence to the United States, thence to Great Britain and finally to Malaysia

6. With that introduction, let me turn directly to the gist of Malaysia's treaty-based claim. In summing up the essence of this part of Malaysia's case, I can do no better than the words of Malaysia's own Counter-Memorial where the position was put in the following terms:

> "Malaysia's claim is based on acquisition by Spain of the possessions of the Sultan of Sulu. The islands adjacent to North Borneo which were situated beyond the three maritime league limit of the 1878 Sulu grant, Ligitan and Sipadan among them, remained under Spanish sovereignty. These possessions were transferred to the United States by the Treaty of 7 November 1900. The United States in turn transferred them to Great Britain by the Treaty of 2 January 1930." (Counter-Memorial of Malaysia, para. 2.2.)

7. The Court will appreciate that, in order for this thesis to succeed, Malaysia bears the burden of proving that each of the links of its chain of title is sound: in other words, that each of the relevant entities — be it the Sultan of Sulu, Spain, Great Britain or the United States — possessed a demonstrably valid title to both islands which could be passed on to its successor. If even one of these links fails, then the legal foundation for Malaysia's case collapses. Obviously, none of the entities listed in the chain of title could pass on title to the islands which it did not

possess itself *(nemo dat quod non habet)*. And if there was no title to pass on or if the chain was broken, then there was no title for Malaysia to inherit by means of State succession.

8. My remarks, Mr. President, will be directed at showing that at each stage of the process, Malaysia's thesis breaks down. In particular, I shall show that:

(i) There is no evidence that the Sultan of Sulu ever possessed, or even thought that he possessed, sovereignty over Ligitan or Sipadan. The Philippines Application for Permission to Intervene last year has reinforced this point. I'll come back to that.

(ii) There is likewise no evidence that Spain considered that it held title to the islands. Spain was utterly indifferent to islands lying so far south and west of its possessions in the Philippines.

(iii) There is also no evidence to suggest that the United States considered that it inherited the islands from Spain at the end of the Spanish-American War. While there may have been some initial uncertainty on the part of the United States Navy shortly after the 1900 Treaty was signed, the United States itself never laid claim to the islands and the State Department knew full well that they lay to the south of any possessions the United States had inherited from Spain.

(iv) Accordingly, there was no title to the islands that the United States could have ceded to Great Britain under the 1930 Anglo-American Treaty even if the United States had wanted to. Of course, the 1930 Treaty was not a treaty of cession, as I shall show. But the important point is that the United States had no interests in Ligitan and Sipadan prior to 1930, the 1930 Treaty did not deal with them, and thereby the islands were not transferred to Great Britain pursuant to that Treaty.

(v) And finally, if Great Britain had no title to the islands that had been ceded to it by the United States, it follows that Malaysia could not have inherited title upon achieving independence.

9. The end result is that not simply is one of the links in Malaysia's chain broken; each and every one of them is fatally flawed. This being the case, Malaysia cannot base a claim to either Ligitan or Sipadan on the theory that it inherited title as a consequence of a series of legal transfers from each of its predecessors in interest.

1. The Sultan of Sulu did not possess sovereignty over Ligitan or Sipadan

10. Let me turn first to the position of the Sultan of Sulu. As Professor Pellet has shown, Malaysia has introduced absolutely no evidence demonstrating that the Sultan of Sulu ever exercised any sovereign rights over either Ligitan or Sipadan. There was no Sulu presence on the islands, no Sulu jurisdiction exercised over them and no attempt by the Sultan to advance any kind of claim to either of the islands.

11. It is this total lack of evidence of an original Sulu title that led Indonesia to observe in its written pleadings that Ligitan and Sipadan never formed part of the Sulu Archipelago or of the Sultan's North Borneo possessions (Memorial of Indonesia, para. 7.25). Malaysia agrees with the first part of that statement. Indeed, Malaysia's own Counter-Memorial expressly concedes that Ligitan and Sipadan were not considered to be part of the Sulu Archipelago (Counter-Memorial of Malaysia, para. 3.14).

12. Where the Parties differ is over the question whether Ligitan and Sipadan were nonetheless part of the Sultan of Sulu's North Borneo possessions. Malaysia claims that they were (Counter-Memorial of Malaysia, para. 3.14). But this assertion, as I shall show, is contradicted by the record.

13. In the first place, Sipadan and Ligitan both lie more than nine miles from the mainland coast, and that point is not disputed by the Parties. So the islands could not have been part of the Sultan of Sulu's North Borneo possessions that were transferred to Messrs. Dent and Overbeck in 1878, no matter how one wants to characterize that grant.

14. Secondly, if there is one country which should have a first-hand appreciation as to whether the Sultan of Sulu ever claimed or exercised sovereignty over a particular territory, it is the Philippines. After all, the Philippines is the successor to the Sultan of Sulu's domains. As we heard during the oral proceedings on the Philippines Application to intervene, the Philippines claim to a portion of North Borneo is based on the historic rights of the Sultan of Sulu. Moreover, as we were also informed, the Philippines considers that its national territory comprises all territories over which the Philippines has an historic right or legal title (CR 2001/1, pp. 33-34).

15. Obviously, we are not here today to debate the merits of the Philippine claim to a portion of Sabah. Indonesia took no position on that point a year ago, and it takes no position today. What

is important, however, is that the Philippines has expressly disavowed having any claim — any territorial interest whatsoever — over Ligitan and Sipadan. This was made clear by the Diplomatic Note sent by the Philippines to Indonesia on 5 April 2001 and it was reaffirmed during the oral proceedings on the intervention last year (see Judgment of 23 October 2001, para. 45). As the 5 April 2001 Diplomatic Note stated, and you can find this at tab 37 of the judges' folders: "[T]he Government of the Republic of the Philippines wishes to reassure the Government of the Republic of Indonesia that it does not have any territorial interest on Sipadan and Ligitan islands."

16. The inescapable conclusion is that the Philippines does not consider Ligitan or Sipadan ever to have formed part of the Sultan of Sulu's historical possessions. In so far as the Philippines, as the successor in interest to the Sultan of Sulu, does not maintain that either Ligitan or Sipadan ever formed part of the Sultan's possessions, then it is impossible to see how Malaysia can suggest that the islands were once within the Sultan's domains. They were not.

2. Spain never possessed title to the islands

17. I turn now to the question whether there is any evidence that Spain had title to the islands. This is the second link in the Malaysian chain, and here I will deal with two aspects of the matter. First, I shall examine the legal instruments pursuant to which Spain succeeded to the rights of the Sultan of Sulu. These were the 1836 Capitulation between Spain and the Sultan and the 1851 Renewed Act of Submission. Also relevant is the 1885 Protocol between Spain, Great Britain and Germany. Secondly, I will consider the issue whether, apart from these legal instruments, there is any independent evidence of Spanish sovereignty over either Sipadan or Ligitan.

(a) *The 1836 Capitulation between Spain and Sulu*

18. Turning first to the 1836 Capitulation, that Capitulation between the Sultan of Sulu and Spain. Pursuant to that Capitulation Spain offered the Sultan its protection over islands within the limits of Spanish jurisdiction (Memorial of Malaysia, Ann. 1). The jurisdiction of Spain was defined in the 1836 Capitulation as extending "from the western point of Mindanao to Borneo and the [island of] Paragua (Palawan), with the exception of Sandakan and the other countries tributary to the Sultan on the continent of Borneo".

19. That language, standing alone, in no way supports the notion that Spanish possessions included Sipadan and Ligitan. Let us examine the map, if we may. The 1836 Capitulation refers to Spanish jurisdiction spanning the area from the western point of Mindanao to Borneo and to Palawan Island. That does not suggest, even on a prima facie basis, Spanish jurisdiction over islands such as Sipadan and Ligitan which lay far to the south.

(b) *The 1851 Act of Submission*

20. The 1851 Act of Submission is equally of no help to Malaysia's case. (Memorial of Malaysia, Ann. 4.) It simply recorded the Sultan's agreement to the establishment of Spanish sovereignty over the island of Sooloo with all its dependencies, which were thereby incorporated into the Philippines Archipelago.

21. Once again, it is instructive to refer to the map; the island of Sooloo is now being highlighted on the map. Clearly that island, together with its dependencies, could not and did not include Sipadan and Ligitan which lie over 100 nautical miles away. Indeed, Malaysia itself is on record in this case as admitting that Sipadan and Ligitan did not form part of the Sulu Archipelago. (Counter-Memorial of Malaysia, para. 3.14.) So the 1851 Act of Submission can hardly be said to be evidence of Spanish sovereignty over the disputed islands.

(c) *The 1885 Protocol*

22. If we turn to the 1885 Protocol, it too does nothing to advance the Malaysian thesis (Memorial of Malaysia, Ann. 15).

23. The 1885 Protocol was concluded between Great Britain, Spain and Germany. Its purpose was to ensure commercial freedom for German and British vessels trading in the Sulu Archipelago and to obtain a renunciation by Spain of any claim to sovereignty over the Sultan of Sulu's North Borneo possessions which had formed the basis of the 1878 grant to the BNBC. Pursuant to Article I, the Protocol provided as follows:

> "The Governments of Great Britain and of Germany recognise the sovereignty of Spain over places effectively occupied, as well as over those places not yet occupied, of the Archipelago of Sulu (Jolo), of which the limits are laid down in Article II."

24. Article II then repeated the formula that had appeared in the 1836 Capitulation. It stated:

> "The Archipelago of Sulu (Jolo), comprises all the islands which are found between the western extremity of the island of Mindanao on the one side, and the continent of Borneo and the island of Paragua (Palawan) on the other side, with the exception of those which are indicated in Article III."

25. In Article III, Spain renounced in favour of Great Britain all claims of sovereignty on the continent of Borneo, which then belonged or had belonged to the Sultan of Sulu, including all islands within a zone of 3 marine leagues (or 9 miles) from the coast. And as I have said, the Parties agree in this case that Ligitan and Sipadan were not covered by this arrangement given that they lay more than 3 marine leagues (or 9 miles) from the coast.

26. The 1885 Protocol also stipulated that if Spain were to occupy any other islands in the Sulu Archipelago other than those that it then occupied, it would notify Great Britain and Germany accordingly.

27. As of 1885, Spain did not occupy either Ligitan or Sipadan. Nor did Spain ever do so afterwards. In these circumstances, it is impossible to see how any of the instruments mentioned in Malaysia's pleadings — be they the 1836 and 1851 Capitulations or the 1885 Protocol — establish the existence of Spanish sovereignty over Ligitan and Sipadan.

28. If, Mr. President and Members of the Court, there are no legal instruments which show Spanish title to the islands, what about other kinds of evidence? Is there any anecdotal evidence that Spain, nonetheless, considered itself to be sovereign over the islands? Perhaps the best way to answer this question is to quote Malaysia's own written pleadings and to see what Malaysia has to say about the issue. Here is a sample of what Malaysia has to say:

— First, from Malaysia's Reply: "There is no evidence that Spain paid any attention to the islands off the Borneo coast, whether within or outside the nine nautical mile line. Indeed, all the evidence is to the contrary." (Reply of Malaysia, para. 2.19.)

— Next, "Spain appears to have been quite indifferent". (Memorial of Malaysia, para. 5.19.)

— Further, "So far as those islands were concerned, the remaining question concerned the identification of which islands belonged to Britain because they were within three marine leagues of the Borneo coast, and which belonged to Spain . . . But in fact that question was not raised even by Spain." (Memorial of Malaysia, para. 5.20 *(c)*.)

— And fourth, "The Spanish have never claimed or exercised any sovereign rights over them [meaning the islands] as far as I know." (Memorial of Malaysia, para. 5.30, quoting a local BNBC official in North Borneo.)

29. Mr. President, Members of the Court, these kinds of admissions by Malaysia are an extraordinary basis on which to try to construct a theory that Spain held title to Ligitan and Sipadan. It is in the light of the *complete absence of any evidence* of Spanish title over the islands that Malaysia's very pertinent observation made in its Counter-Memorial deserves to be recalled. There Malaysia stated: "Evidently, if Spain had no rights over Sipadan and Ligitan in 1898, there was nothing it could have transferred to the United States by the Treaties of 1898 and 1900." (Counter-Memorial of Malaysia, para. 3.17.) That, Mr. President, is a statement which Indonesia fully agrees with.

30. These same considerations dispose of Malaysia's argument that, even if the 1891 Convention had been intended to allocate Ligitan and Sipadan to the Netherlands, this would have been impossible because Great Britain had no title to cede given that the islands are said to have been Spanish at the time. (Reply of Malaysia, paras. 1.8 (4) and 1.14.) But this proposition simply begs the question which Malaysia has to prove. The fact of the matter is that Spain neither possessed sovereignty over the islands nor acted as if it did. There was, therefore, no impediment whatsoever to Great Britain and the Netherlands agreeing in the 1891 Convention that the 4° 10' N latitude would serve as the line separating their respective possessions in the area. Not surprisingly, Spain, just as Great Britain, saw no reason to protest the Dutch Explanatory Memorandum map depicting this line, to which Sir Arthur has referred.

3. The lack of any United States claim over the islands

31. Having dealt with the first two links in Malaysia's treaty-based chain of title, I can now turn to the position of the United States. Malaysia not only contends that the United States received the islands from Spain at the end of the Spanish-American War, but also that the United States independently claimed them afterwards. (Counter-Memorial of Malaysia, para. 3.1 *(d)*.)

32. Such confident assertions may not be surprising given the nature of Malaysia's case, but as I shall show, they are advanced at the expense of mischaracterizing, and in some cases ignoring, the key evidence. Since this part of Malaysia's claim really lies at the heart of its case, I hope, Mr. President, the Court will indulge me while I examine the evidence in some detail.

(a) *The 1898 and 1900 Spanish-United States Treaties*

33. In 1898, following the Spanish-American War, Spain ceded to the United States under the Treaty of Peace of Paris the archipelago known as the Philippine Islands including the islands lying within the line that now appears in red on the screen. (Memorial of Indonesia, Ann. 93.)

34. Pursuant to Article III of that Treaty, those possessions were limited on the south along a line drawn across the 4° 45' N latitude. The Parties agree that neither Ligitan nor Sipadan were included within this cession, and that can clearly be seen from the map (Counter-Memorial of Malaysia, para. 3.19).

35. Two years later, on 7 November 1900, the United States and Spain entered into a further agreement for the cession of additional islands lying outside the limits set by the 1898 Treaty (Memorial of Indonesia, Ann. 94). The 1900 Convention contained one substantive provision which reads as follows — and you can find in tab 38 of the judges' folders:

> "Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan Sulu and Sibutu and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines."

36. The Court will see on the screen — now being highlighted — the islands of Cagayan Sulu and Sibutu to which particular reference was made in the 1900 Treaty. The fact that neither of these islands, nor their dependencies, lies in the vicinity of Ligitan or Sipadan reinforces the position that the United States inherited no sovereignty over these two islands from Spain even under the 1900 Treaty. Spanish possessions transferred to the United States simply did not extend that far to the south-west.

37. But notwithstanding this, Malaysia argues that the 1900 Treaty was understood as covering Ligitan and Sipadan (Memorial of Malaysia, para. 5.25). The principal basis on which Malaysia advances this contention centres upon a voyage that a United States naval vessel, the *Quiros*, made to the region in the summer of 1903 and a provisional map that was thereafter issued by the United States Department of the Navy. It is this portion of Malaysia's case which suffers from a highly selective recitation of the facts. Let me go through them with the Court's indulgence.

(b) *The voyage of the "Quiros" and the 1903 United States provisional map*

38. Indonesia does not dispute the fact that in June 1903 a United States naval vessel, the *Quiros*, undertook a fact-finding mission in the course of which it visited a number of islands lying more than nine miles off the mainland coast of Borneo. The logbook of the *Quiros*'s captain — Lt. Boughter was his name — indicates that Sipadan was amongst the islands visited although Ligitan was not.

39. What Indonesia does dispute is Malaysia's claim that Lt. Boughter's actions evidence a claim by the United States of sovereignty over the islands. It is true, it is true that Lt. Boughter purported to claim the islands on behalf of the United States. But the important point, passed over in silence by our colleagues, is that the State Department, which was responsible for deciding on United States claims in the region, completely disassociated itself from Lt. Boughter's actions and did not advance any claim to Ligitan or Sipadan based on the voyage of the *Quiros* — or on any other basis, for that matter.

40. To appreciate the true position, it is necessary to refer to another element which is central to Malaysia's case. And that is a map which is chart 2117, issued by the United States Hydrographic Office at the request of the Navy in June 1903, and you will find a copy of this map at tab 39 of the folders.

41. Mr. President, the Court, I trust, will readily see why Malaysia is so attached to this map. Malaysia has highlighted the caption indicating "boundary line" on the map — a line which conveniently encompasses both Sipadan and Ligitan. Malaysia has also highlighted the caption indicating that the features enclosed by this line are "under the sovereignty of the United States of America". In Malaysia's view, "[t]his map represented a public assertion by the United States of its sovereignty over the additional islands ceded to it by the 1900 Treaty, an assertion which occasioned no reaction from The Netherlands" (Memorial of Malaysia, para. 5.26).

42. From a reading of Malaysia's pleadings, one might be forgiven for having the impression that this was the end of the story. A United States naval officer claimed Sipadan and Ligitan for the United States and a map illustrating the claim was issued shortly thereafter. But the facts are otherwise.

43. Take the map, for example — the map on the screen. Malaysia acts as if it represented a definitive assertion of United States sovereignty over the islands. But what Malaysia has neglected to inform the Court is that the map showing the so-called "boundary line" encompassing Ligitan and Sipadan was subsequently forwarded by the War Department to the United States Secretary of State with a request to the State Department to confirm whether that boundary line was correct or an error (Reply of Indonesia, Ann. 8). And you will find that request in the document at tab 40.

44. The Secretary of State responded on 23 October 1903 (Memorial of Indonesia, Ann. 104). Despite the fact that Indonesia referred to this crucial document in both its Memorial *and* in its Counter-Memorial and annexed a copy, Malaysia has persisted in ignoring its existence in all of its written pleadings. We have included it, for the Court's convenience, at tab 41. Here are some of its relevant passages, and I quote from the letter of the Secretary of State, in response to the map:

> — "This department [in other words the State Department] did not undertake to trace the line demarking the respective jurisdictions of Great Britain and Spain to which latter the United States has succeeded *in toto*. We are not in a position to apply on the charts the line described in general terms by the conventions entered into by Spain and Great Britain and Germany."

The letter continued:

> — "Any line drawn by either party in interest for itself alone would necessarily be tentative unless assented to by the other party."

The letter continued:

> — "Under these circumstances this department is unable to either confirm or alter the line drawn *ex parte* upon the chart you have received from the Hydrographic Office of the Navy Department."

The letter did remark, however, that:

> — "The prolongation of the red tracing from the eastward of Sibutu to and around Sipadan Island and thence northwardly to Darvel Bay would probably require to be supported by evidence that Sipadan and the included keys and rocks had been recognized as lying within the dominions of Sulu described in the conventions between Spain on the one hand and Great Britain and Germany on the other. This is a question of fact which the Department of State has no means of determining and considering which an opinion would be mainly *ex parte*."

The letter then added the following very important observation:

> — "The Treaty of Nov. 7, 1900, by expressly including the Island of Sibutu may have intended such inclusion as *exceptional* and as a *limit* to the claims of Spanish dominion to the southwest of the Sulu group."

45. Again, it may be useful to place a map of the area covered by the 1900 Treaty on the screen in order to understand the implications of what the Secretary of State was saying in this letter. The important point referred to by the Secretary was that the limit of Spanish possessions relinquished to the United States in 1900 in the south-west was in all likelihood restricted to Sibutu Island and its immediate dependencies — features which lie well to the north and east of Ligitan and Sipadan. As will be seen, this continued to be the United States position in subsequent negotiations with Great Britain culminating in the signature of the 1930 Anglo-United States Treaty. Throughout this period, from October 1903 to 1930, the United States never advanced claims to any islands lying to the south-west of Sibutu and its dependencies.

46. The Secretary of State's letter of 23 October 1903 concluded with the following recommendations:

> "Under all the circumstances I am not prepared to advise the insertion of the red and black boundary lines upon the copies of the War Department's official map of the Philippine Islands. Instead of doing so, I suggest that a note be printed either in the general legend of the map or in brackets *in situ* to the effect that by a treaty signed November 7, 1900 Spain relinquished to the United States all title to islands belonging to the Philippine Archipelago and lying outside the lines described in the Treaty of Peace of December 10, 1898, and in particular to Cagayan-Sulu and Sibutu and their dependencies."

47. As a result of this letter, Mr. President, instructions were given to the United States Hydrographic Office to delete the "boundary line" that had been drawn around Ligitan and Sipadan on the map which Malaysia has relied on (Reply of Indonesia, Ann. 9). A new map was accordingly prepared in accordance with the Secretary of State's directions. A copy of that map is now shown on the screen and is also included at tab 42. Perhaps Malaysia will explain in its oral presentation why it did not see fit to disclose this map.

48. As the Court will observe, this map is the second edition, replacing the provisional map that was relied on by Malaysia. There is *no* boundary line around Ligitan and Sipadan and *no* caption saying that the islands are under United States sovereignty. Instead, in accordance with the Secretary of State's instructions, the wording from the 1900 Treaty is reproduced at the bottom of the map. In short, Mr. President, Malaysia's map — or, at least the boundary line on that map —

disappeared! That puts to rest Malaysia's argument that — and I am quoting from Malaysia's pleading — "whatever definition might be given to the 'Sulu Archipelago', the United States did in fact claim all those islands, as the 1903 map shows" (Counter-Memorial of Malaysia, para. 3.20; see also, Reply of Malaysia, para. 2.25). It also disposes of Malaysia's criticism that the Netherlands should have reacted to the map. Quite simply, there was nothing to react to since the boundary line had been deleted.

49. If any further evidence is required demonstrating that the United States did not endorse Lt. Boughter's rather zealous claim of sovereignty over islands such as Ligitan and Sipadan lying south of Sibutu Island, it is provided by the letter that the Secretary of the Navy sent to the Commander-in-Chief of the United States Asiatic Fleet on 11 March 1904; the Commander of the Asiatic Fleet would, I imagine, have been Lt. Boughter's superior (Memorial of Indonesia, Ann. 107). A copy of this letter may be found at tab 43. It stated:

> "The subject of the sovereignty of the islands off Borneo is now under discussion. You will therefore, in order to avoid complications, refrain from any assertion of United States sovereignty or any act of possession of those islands off Borneo while the subject is under discussion."

50. As a result of these developments, and bearing in mind the Secretary of State's view that Sibutu Island and its immediate dependencies represented the southernmost limits of the possessions acquired from Spain under the 1900 Treaty, the United States issued a new map illustrating the extent of its jurisdiction in the Philippines. That map is being placed on the screen and a copy appears at tab 44 of the folder.

51. The Court will see that the blue line on this map represented the limits of United States possessions acquired under the 1898 Treaty with Spain. The red line represented the view taken by the United States as to the extent of the possessions it had acquired pursuant to the 1900 Treaty with Spain.

52. If we enlarge the relevant area of the map, it can clearly be seen that the United States did not consider that it had acquired sovereignty over Ligitan or Sipadan from Spain under the 1900 Treaty. The red line falls well to the north of both islands. This is another map which Malaysia neglected to produce with its pleadings. As can be seen, it fundamentally contradicts

Malaysia's theory that the United States possessed sovereignty over the disputed islands which it could have passed on to Great Britain in 1930.

(c) *The 1903 Confirmation of Cession also supports Indonesia's case*

53. Mr. President, there is another development which took place in 1903 which, although it was embraced by Malaysia in its initial Memorial, has now turned out to be something of an embarrassment for our distinguished opponents. This was the Confirmation of Cession signed by the Sultan of Sulu on 22 April 1903, a copy of which is at tab 45.

54. This is a very peculiar document. It stated that the Sultan, of his own free will, was pleased to cede to the Government of North Borneo "all the islands in the neighbourhood of the mainland of North Borneo from the Island of Bangii to Sibuku Bay". It then listed the islands in question. I will not attempt to read out these islands, but they are in the document and on the screen.

> "These are their names: Mulayangin, Mulayangin Kechil, Malawali, Tigabu, Bilian, Tagapil, Langkayan, Boan, Lahiman, Baguan, Mantanbuan, Gaya, Omadal, Siamil, Mabul, Kapalai, Dinawan, and other islands near, or round, or lying between these said islands named above."

The Confirmation then concluded:

> "The reason why the names of the islands are not mentioned in the agreement made with Baron de Overbeck and Mr. [now Sir] Alfred Dent on the 19th Muharram 1295, corresponding to the 22nd January 1878, is because it was known and mutually understood that these islands [the ones listed there] were included in the grant of the countries and islands mentioned in the Agreement above referred to."

55. The Court will note that neither Ligitan or Sipadan were mentioned in this document. It may assist the Court if the location of each of the features that were named in the confirmation are identified on a map; you can also see this at tab 46 of your folders. Here they are, together with an indication of the 3-marine-league — or 9-mile — limit of the BNBC's jurisdiction.

56. It is quite clear that the whole purpose of the 1903 Confirmation was to enable the BNBC artificially and after the fact to claim title to islands lying more than 9 miles from the coast — in other words, to islands which were not covered by the original 1878 grant to the BNBC or the 1885 Protocol. As such, it was a trumped-up document. Even Malaysia concedes that the

British Government did not view the Confirmation as having any legal validity whatsoever (Memorial of Malaysia, para. 5.35, and Counter-Memorial of Malaysia, para. 3.16).

57. Nonetheless, Malaysia persists in maintaining that the Confirmation was intended to encompass Ligitan and Sipadan even though they were not referred to in the document itself (Memorial of Malaysia, para. 5.34). For as Indonesia pointed out in its Counter-Memorial, this presents our colleagues on the other side of the Bar with something of a dilemma.

58. If the Confirmation was meant to cover Ligitan and Sipadan as Malaysia suggests, then its effect would have been to vest title to the islands in the BNBC. However, Malaysia's principal argument — its main argument — is that in 1903 title vested in the United States. How could title vest and lie in two different entities simultaneously? That is a question Malaysia has not bothered to answer.

59. Be that as it may, the true position is that title vested *neither* in the BNBC *nor* in the United States at the time. The BNBC had no title because the islands, by Malaysia's own admission, were not within the Sultan of Sulu's 1878 grant to the BNBC or within the 1885 Protocol. The United States had no title for the reasons that I have explained a few moments ago.

60. Moreover, regardless of its legal defects, the fact remains that the 1903 Confirmation did not name Ligitan and Sipadan as islands that were being ceded to British North Borneo even though it would have been perfectly possible to have done so had the intention been to include them. Other very small islands were named in painstaking detail: why not Sipadan and Ligitan? The answer lies in the fact that it was well known to the BNBC in 1903 that Ligitan and Sipadan did not belong to North Borneo. With the Court's indulgence, let us return to the map.

61. It is no accident that all of the islands named in the 1903 Confirmation lie to the *north* of the 4° 10' N latitude which was agreed in 1891. The BNBC had no hesitation in claiming those islands as long as the Sultan of Sulu would go along with the arrangement. But islands lying *south* of the 4° 10' line such as Ligitan and Sipadan were another matter since these had been allocated to the Netherlands by the 1891 Convention. They were thus not covered by, and not named in, the 1903 Confirmation.

62. This position was confirmed by the map of the area that Stanfords published for the BNBC just four months after the 1903 Confirmation was entered into — a map which was referred to earlier this afternoon by Professor Soons.

63. Here is that map once again. Note, if you would, Mr. President and Members of the Court, that all of the islands named in the 1903 Confirmation fall within the limits of the BNBC's territorial domains which lie to the north of the 4° 10' line of latitude. Sipadan and Ligitan fall to the south of that line, and hence on the Dutch side of the boundary. And that explains why they were not named in the Confirmation.

64. At the end of the day, the 1903 Confirmation of Cession adds nothing to Malaysia's case. If anything, it provides further evidence that Ligitan and Sipadan were considered to be Dutch by virtue of the fact that they lay to the south of the 4° 10' N latitude.

Mr. President, with your permission I would suggest that that might be an appropriate point to break for the afternoon.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur Bundy. Nous allons effectivement nous arrêter là. La séance est levée. La prochaine séance aura lieu demain matin à 10 heures.

L'audience est levée à 18 heures.

CR 2002/29

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2002

Public sitting

held on Tuesday 4 June 20002, at 10 a.m., at the Peace Palace,

President Guillaume presiding,

in the case concerning **Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le mardi 4 juin 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

en l'affaire relative à la **Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping.

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping.

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte et je donne la parole à M. Rodman R. Bundy au nom de la République d'Indonésie.

Mr. BUNDY: Merci, Monsieur le président.

Mr. President, Members of the Court, we have had distributed some extra tabs for your folders which will follow the presentation of Indonesia this morning and I would point out that, in the last tab of the folders, we have put a resume, or summary outline, of Indonesia's presentation.

65. Yesterday afternoon I had dealt with the absence of any evidence supporting a claim of sovereignty by Malaysia by either the Sultan of Sulu or Spain over Ligitan and Sipadan. I also demonstrated that the United States made no assertion of sovereignty over Ligitan and Sipadan in 1903 or at any time thereafter. Nonetheless, as the correspondence shows, the United States did realize that it was important and necessary at some point to conclude a definitive boundary agreement with Great Britain. It is to these developments that I would like to turn this morning.

(d) *The 1907 Exchange of Notes is of no assistance to Malaysia as far as the question of sovereignty is concerned*

66. In 1907, a temporary arrangement was reached between the United States and Great Britain regarding the issue. Great Britain was conscious of the fact that it had no title to islands lying more than 9 miles from the coast under the 1878 grant to Dent and Overbeck and under the 1885 Protocol. Nonetheless, the BNBC was administering some islands lying more than 9 miles from the coast, although Ligitan and Sipadan were not amongst those. The BNBC wanted to maintain that administration, particularly to suppress piracy.

67. The arrangement with the United States was recorded in an Exchange of Notes between the two Governments: between the British Ambassador in Washington and the Acting United States Secretary of State in 1907. That exchange may be found at tab 47 of your folders (Memorial of Indonesia, Anns. 113 and 114). That exchange provided that the BNBC would be left undisturbed in the administration of certain islands lying more than 9 miles from the coast west of a line which had earlier been drawn by Sir H. M. Durand, until a boundary treaty could be concluded between the two parties. However, the Exchange of Notes — the 1907 exchange — in the second

paragraph thereof, made it very clear that any such administration would not carry with it any territorial rights.

68. The map that was attached and referred to in the Exchange of Notes now appears on the screen. The red line — which is difficult to see here, but it is this line coming down here — that red line was the line that resulted from the Durand proposal. But that line had nothing to do with issues of sovereignty. Malaysia argues that, by the exchange, Britain recognized United States sovereignty over islands lying more than 3 marine league — or 9 miles — to the west of that red line (Memorial of Malaysia, para. 5.39). That is simply not true. The Exchange of Notes — the 1907 exchange — was sovereignty neutral. Indeed, the fifth paragraph of the exchange expressly recognized that a boundary treaty remained to be agreed between the United States and Great Britain. The second paragraph of the exchange stipulated that any administration that might take place would not carry with it any territorial rights.

69. Malaysia also asserts that the 1907 exchange showed that the affected islands, i.e., Sipadan and Ligitan, were being administered by Great Britain (Counter-Memorial of Malaysia, para. 3.24). But again this is not correct. The Exchange of Notes did not identify any specific islands lying more than 9 miles from the coast that were then being administered by the BNBC. And, as Professor Pellet will show shortly, there was no BNBC administration over Sipadan or Ligitan in 1907 and certainly not *en tant que souverain*. It is therefore nothing more than a bootstrap argument for Malaysia to rely on the 1907 exchange as "creating" British administration over the disputed islands where there was none.

70. What is more, subsequent internal memoranda and diplomatic correspondence exchanged between the United States and Great Britain leading up to the 1930 Convention made it very clear that the islands that *were* the subject of the 1907 exchange were the Turtle Islands and the Mangsee Islands lying far to the north.

71. In May 1927, for example, Mr. Frank Kellogg of the United States State Department sent a letter to the President of the United States which made the United States view as to the scope of the 1907 exchange clear (Reply of Indonesia, Ann. 13). The relevant part of Mr. Kellogg's letter to the President reads as follows:

> "In 1907 a temporary agreement was reached between the United States and Great Britain by which the administration of certain islands *(known as the Turtle Islands Group)*, located near the north coast of British North Borneo, was left in the hands of British North Borneo Company until the respective governments should, by treaty, delimit the boundaries between their respective domains. This agreement was made because it was not possible at that time to arrive at a definite agreement concerning the boundary between the possessions of the United States and Great Britain in that region and for the further reason that the Philippine Government was not in a position to assume administration of the islands, even if it had been possible to agree on the islands which should be administered as part of the Philippine group."

72. As is clear from this letter, the Turtle Islands were the islands lying further than 9 miles from the coast being temporarily administered by the BNBC. Those were the islands that were the subject of the 1907 exchange. Yet, as one can see from the map, the Turtle Islands lay far to the north of Ligitan and Sipadan and even to the north of Sibutu Island, which the Court will recall the Secretary of State of the United States had indicated, in October 1903, was the southernmost limit of the possessions acquired by the United States from Spain. The United States had no pretensions to islands lying south of Sibutu such as Ligitan and Sipadan.

73. It is significant that the British Government took the same view. As part of the correspondence that was exchanged at the time of the signature of the 1930 Convention, the British Ambassador in Washington wrote to the American Secretary of State, Henry Stimson, as follows (Reply of Indonesia, Ann. 20):

> "By the convention concluded between the President of the United States of America and His Britannic Majesty for the purpose of delimiting the boundary between the Philippine Archipelago on the one hand and the State of [British] North Borneo which is under British protection on the other hand, the sovereignty over certain islands which have for many years past been administered by the British North Borneo Company has been definitively recognized as pertaining to the United States of America. *These islands which formed the subject of the arrangement affected by an exchange of notes between His Majesty's Government and the United States Government on the 3rd and 10th July, 1907, are:*
>
> [and then the Memorandum lists the islands]
>
> 1. Sibeung, Bosan, Lihiman, Langaan, Great Bakkungaan, Taganak and Bagaan in the group of islands known as the Turtle Islands.
>
> 2. The Mangsee Islands."

74. Those were the islands subject of the 1907 exchange and, once again, it is instructive to refer to the map. The Turtle Islands, as I mentioned a few moments ago, lie here. The Mangsee Islands up to the north.

75. As this correspondence shows, the subject of the 1907 Exchange of Notes concerned United States rights and BNBC administration over the Turtle and Mangsee Islands. Nothing was said about Ligitan or Sipadan for the simple reason that the United States did not consider them to fall within the possessions it had inherited from Spain. In fact, as Professor Soons has shown, in the meantime the Netherlands had taken concrete actions to confirm its title over both Ligitan and Sipadan by sending the *Lynx* and its seaplane to the islands in 1921 in a physical display of Dutch sovereignty. In these circumstances, it was entirely understandable, I would suggest, why the United States was not affected by the visit of the *Lynx* and did not protest it.

4. The islands were not ceded to Great Britain under the 1930 Anglo-United States Convention

76. The final link in Malaysia's treaty-based chain of title is the 1930 Anglo-United States Convention, which is in tab 48 of the judges' folder. Malaysia's contention is that, by this instrument, the United States voluntarily ceded Ligitan and Sipadan to Great Britain because the United States no longer wanted to retain either island, and that Great Britain thereby acquired sovereignty over the islands which it could subsequently pass on to Malaysia (Counter-Memorial of Malaysia, para. 3.25).

77. This hypothesis suffers from two fundamental defects. First, as Indonesia has shown, and as I discussed yesterday afternoon, the United States never had title to the islands in question. The islands were not part of the former Spanish possessions in the area acquired by the United States and the United States did not claim them. So they could scarcely be ceded by the United States to Great Britain. Secondly, the 1930 Convention was not a treaty of cession in any event. The United States at that time was under intense pressure from the nascent Philippines Government not to relinquish title to any territory to which the Philippines had an historic right. Nothing in the diplomatic background to the 1930 Convention suggests that the United States was amenable to ceding anything, let alone Ligitan or Sipadan.

78. As the correspondence I have reviewed shows, the United States purpose in negotiating the 1930 Convention with Great Britain was to confirm its — that is the United States — own title over the Turtle Islands and the Mangsee Islands by means of a definite boundary agreement. The BNBC, which was administering the Turtle Islands and which had built a lighthouse on the island

of Taganak — which is one of the Turtle Islands — was lobbying the British Government to persuade the United States to cede the islands — the Turtle Islands — to Great Britain or at least to permit the BNBC to continue to administer them for an indeterminate time. (See, for example, Reply of Indonesia, Anns. 15 and 19 and Reply of Indonesia, paras. 6.59-6.61.)

79. The British Government, on the other hand, recognized that any cession by the United States would be out of the question. This was reflected in a memorandum sent from the British Embassy in Washington to London on 6 August 1929 which set out the position of the British Government in the following terms (Reply of Indonesia, para. 6.62 and Ann. 18 thereto):

> "As regards the proposals in the memorandum [this was the proposal for a cession of the Turtle Islands to Great Britain] the American representatives, while admitting that administration of the islands was easier from Sandakan than from Manila, took the view that cession or sale, and even lease of the islands to North Borneo would present insurmountable difficulties owing to the attitude in such matters of the United States Senate, and also, they led us to believe, to opposition on the part of the Philippine Government."

80. The boundary line agreed by the 1930 Convention now appears on the screen in a violet — or purple colour — you can also find it at tab 48. That line reflects the consistent position of the United States ever since the Secretary of State's letter of 23 October 1903. The Turtle Islands and the Mangsee Islands lying more than 9 miles from the Borneo coast were recognized as belonging to the United States. In the south, American possessions included Sibutu Island and its dependencies, but nothing else to south of them. Nothing was relinquished or ceded by the United States in this Convention. It did not press a claim to Ligitan, Sipadan or any of the other islands lying to the south-west of Sibutu because it had not inherited these islands from Spain. By the same token, Great Britain did not acquire Ligitan or Sipadan from the United States under the Convention because the islands were not the United States to cede.

81. Malaysia's final argument concerning these developments is framed as a rhetorical question. If Indonesia is right, Malaysia asks, "what are the consequences for the group of five islands (Kapalai, Danawan, Si Amil, Ligitan and Sipadan) which lie to the south of the 1930 Convention line, but more than 9 nautical miles from the coast of Borneo?" (Counter-Memorial of Malaysia, para. 3.28.)

82. The answer to that question is straightforward. As Sir Arthur Watts has explained, ownership of these islands, which never formed part of the possessions of the Sultan of Sulu, Spain or the United States, was resolved by means of the 1891 Anglo-Dutch Convention. Article IV of the Convention operated as much in favour of Great Britain as it did in favour of the Netherlands. Islands to the north of the 4° 10' N latitude, including islands such as Kapalai, Danawan and Si Amil, were allocated to Britain precisely on the basis of Indonesia's view of Article IV of the Convention. And islands to the south of that line — Ligitan and Sipadan — were allocated to the Netherlands. The 1930 Convention had no impact on this situation. It did not deal with Ligitan and Sipadan and it was *res inter alios acta* as far as the Netherlands was concerned.

C. Conclusions

83. Mr. President, Members of the Court. That brings me to the end of my intervention. In Indonesia's submission, not simply has Malaysia not been able to sustain its burden of proof that each of the links in its treaty-based chain of title is sound, the evidence points overwhelmingly in the opposite direction.

84. I thank the Court for its courtesy and I would ask, Mr. President, if you would call upon Professor Pellet to continue Indonesia's presentation.

The PRESIDENT: Thank you very much, Mr. Bundy. Je vais maintenant passer la parole à Monsieur le professeur Alain Pellet.

M. PELLET : Merci beaucoup.

L'ABSENCE DE TITRE MALAISIEN FONDE SUR LES EFFECTIVITES

Monsieur le président, Madame et Messieurs les juges,

1. Il m'appartient ce matin de montrer que, loin d'établir la souveraineté de la Malaisie sur Pulau Ligitan et Pulau Sipadan, les activités menées sur ces deux îles par les Parties et leurs prédécesseurs confirment le titre que l'Indonésie tient de la convention de 1891. Je ferai ceci en deux temps. Dans cette première intervention, après quelques considérations générales sur le rôle que peuvent jouer les effectivités — non pas dans l'abstrait, mais dans le cadre du présent différend —, je montrerai que les effectivités qu'invoque la Malaisie n'ont certainement pas pour

effet de lui conférer le titre territorial qui lui fait défaut par ailleurs. Mme Loretta Malintoppi me succédera à cette barre pour établir qu'il en va de même s'agissant du matériau cartographique. Puis je reviendrai pour démontrer brièvement que les conduites respectives des Parties concourent à la confirmation du titre, bien réel, dont se prévaut l'Indonésie.

I. La pertinence limitée des «effectivités» dans le présent différend

2. Toutefois, Monsieur le président, j'avoue mon embarras — car après trois ans et demi et trois tours de plaidoiries écrites, je n'ai toujours pas compris le rôle que nos amis malaisiens entendent faire jouer aux effectivités.

3. Les Parties s'accordent pour considérer que les îles en litige n'étaient pas *res nullius* au moment de la colonisation de Bornéo par les Pays-Bas, puis par le Royaume-Uni. Comme l'a écrit la Malaisie, «*[t]here can be no suggestion that any of [the islands] is, or at the relevant time was* terra nullius» (mémoire de la Malaisie, p. 10, par. 3.1; voir aussi mémoire de l'Indonésie, p. 37, par. 4.1 et contre-mémoire de l'Indonésie, p. 11, par. 3.2). Il ne saurait faire de doute que les peuples de la région avaient une «organisation sociale et politique» sophistiquée (cf. *Sahara occidental*, avis consultatif, 16 octobre 1975, *C.I.J. Recueil 1975*, p. 39, par. 80) et il ressort de l'exposé des conceptions territoriales des sultans locaux, que l'Indonésie a présentées dans son mémoire sans être contredite et que j'ai brièvement rappelées hier (CR 2002/27, p. 41-42, par. 15), que les sultans locaux n'accordaient qu'une importance marginale aux îles inhabitées se trouvant au large des côtes sur lesquelles ils exerçaient leur autorité tout en les considérant comme leurs (p. 38-44, par. 4.3-4.19).

4. Comme on l'a écrit, «*[t]he connection with the* terra nullius *is pointed to as an important point of distinction between effective occupation and acquisitive prescription*» (I. Brownlie, *Principles of International Law*, Clarendon Press, Oxford, 1998, p. 136-137). Si Pulau Ligitan et Pulau Sipadan avaient *été res nullius*, on se serait trouvé dans une hypothèse classique d'acquisition territoriale par occupation et il eût appartenu à la Cour de peser les manifestations respectives d'autorité effective des deux Etats ou de leur(s) prédécesseur(s). Mais ce n'est pas le cas : quoiqu'elles soient en désaccord sur le titulaire du titre, les deux Parties s'accordent pour considérer qu'il en existait un dès l'origine.

5. Dès lors, les effectivités — coloniales ou post-coloniales — ne peuvent avoir, en droit, que deux fonctions :

— ou bien, elles confirment le titre pré-existant;

— ou bien, elles le déplacent, en admettant que ce soit possible, ce qui est fort loin d'être évident.

6. Il suffit à cet égard de citer à nouveau le *dictum*, à juste titre fameux (car il expose l'alternative de façon claire et concise), de la Chambre de la Cour dans l'affaire du *Différend frontalier Burkina/Mali* :

> «Dans le cas où le fait correspond exactement au droit, où une administration effective s'ajoute à l'*uti possidetis juris*, l'«effectivité» n'intervient en réalité que pour confirmer l'exercice du droit né d'un titre juridique. Dans le cas où le fait ne correspond pas au droit, où le territoire objet du différend est administré effectivement par un Etat autre que celui qui possède le titre juridique, il y a lieu de préférer le titulaire du titre.» (Arrêt du 22 décembre 1986, *C.I.J. Recueil 1986*, p. 586-587, par. 63.)

Et la Cour a pleinement confirmé cette façon de voir dans son arrêt du 3 février 1994 dans l'affaire du *Différend territorial* entre la Libye et le Tchad, lorsqu'elle a considéré que, dès lors qu'existe un titre conventionnel, «l'effectivité de l'occupation des zones pertinentes dans le passé et la question de savoir si cette occupation a été constante, pacifique et reconnue ne sont pas des points que la Cour [doit] trancher dans [cette] affaire» (*C.I.J. Recueil 1994*, p. 38, par. 76).

7. La position de l'Indonésie est claire : elle tient de la convention de 1891 un titre territorial bien établi comme l'a montré sir Arthur Watts (titre qui, du reste, confirme la situation antérieure marquée par l'appartenance des îles contestées à Boeloengan). Les effectivités ne peuvent dès lors que confirmer ce titre, et les manifestations d'autorité dont se prévaut la Malaisie ne peuvent, quant à elles, qu'être écartées et considérées comme des usurpations de compétence territoriale — aisément explicables d'ailleurs par les caractéristiques de la région.

8. La thèse malaisienne — il serait plus approprié de mettre ceci au pluriel — les thèses malaisiennes sont infiniment plus tortueuses et, comme je l'ai dit, je ne suis pas sûr d'en avoir saisi toutes les arcanes — d'autant moins qu'elles ont considérablement varié au cours des différentes phases de la procédure écrite et se contredisent largement. Essayons de nous y retrouver cependant en énonçant successivement les différentes argumentations soutenues par la Malaisie — toutefois,

pour tenter de simplifier les choses, je m'en tiendrai aux trois thèses que révèle la seule réplique, à l'exclusion du mémoire et du contre-mémoire.

9. *Version 1* : la Malaisie aurait hérité du titre originaire du sultan de Sulu sur les îles en litige, dont les habitants lui devaient allégeance (réplique de l'Indonésie, p. 1, par. 1.3 1)) *(sic)* : les îles en question étaient inhabitées; et, *(sic)* encore, la Malaisie ne peut faire état de la moindre manifestation d'autorité de Sulu ou de la BNBC sur ces îles avant 1891; je vais y revenir. Ce titre serait passé à la Malaisie *via* la BNBC et les Etats-Unis — *sic* de nouveau : la Malaisie reconnaît pourtant que le sultan n'a pas cédé son titre à la Compagnie (réplique de l'Indonésie, p. 1, par. 1.3 (2 à 4)) et p. 2, par. 1.3 (5)). Et *quid* des effectivités ici, Monsieur le président ? Elles jouent un très grand rôle car la Partie malaisienne insiste sur l'administration effective des îles par la BNBC à partir de 1878. Ont-elles déplacé le titre de Sulu à la BNBC ? Assurément pas puisque, dans le même temps, la Malaisie admet que celui-ci n'est passé à la Grande-Bretagne que du fait du traité conclu par celle-ci avec les Etats-Unis en 1930. Si administration il y a, c'est donc d'une administration sans titre qu'il s'agit; contre le titre même et toutes ces pseudo-effectivités sont dépourvues de tout effet juridique.

10. *Version 2* de la thèse malaisienne : au paragraphe 1.17 de sa réplique, la Malaisie affirme : «*Even if* (quod non) *the Indonesian argument as to the 1891 Convention were tenable, the islands would now be Malaysian, because Britain and Malaysia subsequently consolidated their title to them.*» (P. 5.) Voilà une singulière «consolidation historique du titre» (quoique l'on puisse penser de la théorie elle-même) : la Partie malaisienne, dans un même mouvement, concède (aux fins de la discussion) qu'elle n'a pas de titre, mais que ce non-titre n'en serait pas moins «consolidé» par les effectivités «*because [the islands] have been administered by Malaysia and its predecessors for more than a century, and that administration is what matters*» (réplique de l'Indonésie, p. 5-6, par. 1.18). Ce n'est plus de la consolidation historique d'un titre (inexistant ici), c'est de la prescription *contra legem*.

11. *Version 3* (qui entend, apparemment, expliquer la précédente mais s'en distingue nettement) : la Malaisie affirme que sa démonstration relative aux effectivités sur les deux îles

> «*serves a dual function: first, it confirms Malaysia's title which is independently based on a series of valid legal instruments [this would be variant 1]; second, even if — in a manner by no means clear or established — the Netherlands had at one time*

> *possessed title to the islands, such title has been displaced by British/Malaysian* effectivités *over the years»* (réplique de la Malaisie, p. 89-90, par. 5.62),

ce qui correspondrait à la version 2; mais avec une nuance d'importance car, cette fois, la Malaisie n'invoque plus la douteuse théorie de la consolidation historique du titre, mais celle, non moins douteuse en droit international, de la prescription acquisitive (*ibid.*, p. 90-91, par. 5.63). Ceci est, en tout état de cause, totalement irréconciliable avec une position fermement exposée dans le mémoire de la Malaisie, dans lequel il était dit que l'invocation de la possession continue et paisible des îles par la Malaisie et ses prédécesseurs *«is not, it must be emphasized, one involving the assertion by Malaysia of a prescriptive title against Indonesia»* (mémoire de la Malaisie, p. 60, par. 6.3).

12. Arrêtons-nous cependant un instant sur cette question de la prescription acquisitive qui passionne toujours beaucoup la doctrine, mais qui, à ma connaissance, n'a jamais été retenue par la jurisprudence, comme l'a constaté le professeur Marcello Kohen en conclusion d'une étude exhaustive (*Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 68; voir aussi p. 473-480).

13. Je résisterai, Monsieur le président, à la tentation de revenir longuement sur la question de savoir si la notion est reçue ou non en droit international. Disons que ceci est pour le moins douteux (voir contre-mémoire de l'Indonésie, p. 122, par. 7.5). En tout cas, si elle y avait sa place, ce ne pourrait être qu'à de strictes conditions et «[n]i la pratique, ni la jurisprudence ... ne permettent d'affirmer que la seule constatation du caractère effectif d'une possession constitue un moyen suffisant pour acquérir la souveraineté d'un territoire donné» (M. Kohen, *op. cit.*, p. 70), contrairement à ce que semble croire la Malaisie qui se dérobe à toute discussion à cet égard (voir note, réplique de la Malaisie, p. 91, par. 5.64).

14. La Cour n'a jamais déterminé ce que pourraient être ces conditions. Toutefois, dans l'affaire de *l'Ile de Kasikili/Sedudu*, sans se prononcer sur la possibilité d'une prescription acquisitive en droit international (cf. arrêt du 13 décembre 1999, *C.I.J. Recueil 1999*, p. 1105, par. 97; voir aussi l'opinion dissidente du juge Fleischhauer, p. 1206, qui éclaire l'arrêt de la Cour sur ce point), elle s'est interrogée sur la question de savoir si les conditions sur lesquelles les deux parties étaient d'accord étaient remplies dans l'espèce dont elle était saisie (*ibid.*, p. 1103-1106, par. 94-99). Je ferai de même, Monsieur le président, tout en précisant que, pour sa part,

l'Indonésie conserve des doutes sérieux sur l'applicabilité de la prescription en matière territoriale et s'en tient à la seconde branche de l'alternative que j'ai énoncée il y a un instant : la possession ne peut pas déplacer un titre — en la présente occurrence, elle ne peut attribuer à la Malaisie la souveraineté sur Ligitan et Sipadan que l'Indonésie tient de la convention de 1891 et, subsidiairement, qu'elle a héritée du sultan de Boeloengan.

15. Ce n'est donc qu'à titre encore plus subsidiaire que je me demanderai si les effectivités dont se prévaut la Malaisie remplissent les conditions énoncées par la Namibie dans l'affaire de *l'Ile de Kasikili/Sedudu*, conditions dont le Bostwana n'avait pas contesté le bien-fondé et qui étaient les suivantes — elles étaient énoncées à l'indicatif mais je les mets au conditionnel car, pour sa part, je le répète, l'Indonésie ne concède pas que la prescription acquisitive ait acquis droit de cité en droit international— mais, si tel était le cas,

> «quatre conditions [devraient] être remplies pour que la possession puisse engendrer un titre par prescription :
>
> 1. La possession de l'Etat … [devrait] être exercée à titre de souverain.
>
> 2. La possession [devrait] être paisible et ininterrompue.
>
> 3. La possession [devrait] être publique.
>
> 4. La possession [devrait] se prolonger pendant un certain temps.» (*C.I.J. Recueil 1999*, p. 1103, par. 94.)

Ces conditions sont d'ailleurs conformes à celles énumérées dans la neuvième édition du traité d'*Oppenheim* — dont la Malaisie fait (à juste titre…) grand cas (cf réplique de la Malaisie, p. 90, note 117 iii), et p. 91-92, par. 5.65) même si ses auteurs se gardent bien, eux aussi, de prendre catégoriquement position sur la réception de la notion en droit des gens (sir Robert Jennings et sir Arthur Watts, *Oppenheim's International Law*, Longman, London, 1992, vol. I, p. 705-708).

16. Confrontons donc, Monsieur le président, les effectivités invoquées par la Malaisie à ces conditions. Il ressort nettement de cet examen que :

II. Les effectivités dont se prévaut la Malaisie n'ont pu ni créer, ni déplacer un titre territorial

17. Je ne m'étendrai guère sur la dernière condition selon laquelle la possession devrait se prolonger pendant «un certain temps», cela est vague et dépend évidemment des circonstances de

l'espèce. Au demeurant, je ne conteste pas que *si* (mais je dis bien : «si») la Malaisie ou ses prédécesseurs avaient exercé à titre de souverain, publiquement et de manière paisible et ininterrompue, des activités sur les deux îles depuis au moins le milieu du XIX^{e} siècle comme elle l'affirme, cette dernière condition serait remplie. Mais ce n'est pas le cas et, de toutes manières, Monsieur le président, aucune des trois autres conditions n'est remplie.

a) *Une liste d'effectivités en trompe-l'œil*

18. Nous avons eu la curiosité d'établir la liste des effectivités pré-coloniales, coloniales et post-coloniales invoquées par la Malaisie. Cette liste apparaît sous le n° 49 du dossier de plaidoiries.

19. Une première chose saute aux yeux : bien que la Malaisie eût fait grand cas de ses effectivités — et un cas de plus en plus grand à mesure que l'on avançait dans les plaidoiries écrites —, ces effectivités se réduisent à très peu de choses. Cette liste n'a, en effet, que l'apparence de la longueur; dès que l'on y regarde d'un peu plus près, force est de constater qu'il reste, en mettant les choses au mieux pour la Malaisie, trois épisodes, qui, même pris ensemble, sont très insuffisants pour créer et, à fortiori, pour déplacer un titre territorial.

20. Commençons par éliminer tout ce qui n'est pas pertinent. Il y a fort à faire, Monsieur le président ! (Dans la liste, tous ces documents clairement non pertinents, même *prima facie*, apparaissent en caractères gras.)

21. On peut d'abord tenir pour dénué de pertinence tout ce qui est postérieur à la date critique aux fins du présent différend, c'est-à-dire à l'année 1969. J'y reviendrai après la pause. Cela neutralise les allégations malaisiennes énumérées sous les n^{os} 43 à 56 de la liste. Tel est aussi le cas de tous les prétendus «faits» et de tous les documents qui ne concernent pas, ou ne mentionnent pas, au moins l'une ou l'autre des deux îles. Et ces documents sont légion.

22. La totalité des documents invoqués par la Malaisie en matière de pêche ou de navigation et portant sur la période pré-coloniale présentent cette caractéristique (n^{os} 1 à 8 de la liste). Prenons par exemple l'annexe 40 au mémoire malaisien (n° 5); c'est un extrait de la réponse du ministère néerlandais des colonies à des questions posées par la commission du budget de la seconde chambre du parlement; il se borne à énoncer une évidence, que reproduit la Partie malaisienne

(mémoire de la Malaisie, p. 35, par. 5.8.b), à savoir que des portions de l'île de Bornéo ne font pas partie des possessions des Pays-Bas mais sans aucunement préciser la consistance de ces portions et, moins encore, sans mentionner nos deux îles. Pour prendre un autre exemple, l'annexe 76 au mémoire de la Malaisie (n° 1 dans la liste) ne présente pas davantage de pertinence; il s'agit d'une déclaration d'une personne présentée comme l'agent du sultan de Sulu sur la côte est de Bornéo; il y est dit que des Bajau d'Omadar (Omadal) se sont emparés d'un bateau à Sibutoe. Or, d'une part, Omadal est situé au sud de Darwel Bay (l'avancée la plus extrême des prétentions raisonnables de Sulu) et Sibutoe se trouve au nord-est de celle-ci et, d'autre part, comme l'Indonésie l'a clairement établi, de façon très argumentée, dans son contre-mémoire (p. 19-37, par. 3.23-3.73), il est impossible de poser l'équation «Bajau Laut = Sulu» comme la Malaisie s'y risque non sans légèreté. Les faits sont relatés dans les documents portant les nos 2, 6 et 7.

23. Davantage, nombre de ces documents vont nettement à l'encontre de ce que la Malaisie veut prouver. Je ne mentionne que pour mémoire le refus des populations de Sandakan de hisser le drapeau espagnol (nos 3 et 4 de la liste) : nous sommes ici, de toutes manières, très loin des confins contestés, même si ce refus montre combien ces soi-disant *«Sandakan Sulus»* se sentaient peu «Sulu». Le document visé sous le n° 8 est plus intéressant : ni Ligitan ni Sipadan n'y sont citées, mais, à le lire, on a la très nette impression que Semporna, fondée en la circonstance, constituait l'avancée extrême de la BNBC vers le sud et, en tout cas, ce document confirme que le territoire qu'elle administrait ne s'étendait pas au-delà de Batoe Tinagat.

24. Le tableau ne change pas après 1891. Ainsi, le raid punitif du *Petrel* (en 1891) (n° 9 de la liste) est dirigé contre des Bajau Laut de Dinawan et n'a rien à voir avec Ligitan et Sipadan; même chose pour le raid de 1892, dirigé, lui, contre les Bajau d'Omadal (n° 10); et l'île la plus au sud mentionnée par les documents cités sous les nos 11, 12, 16, 17, 39 et 42, qui portent sur les régions de Semporna et Dinawan, est Si Amil, au nord du groupe de Ligitan, *«north of the Ligitan Group»*, est-il précisé au n° 11. Quant à la proclamation de 1901 sur les bateaux et les pêcheries (n° 13 de la liste), elle est très intéressante, mais pas du tout, comme la Malaisie voudrait le faire croire, parce qu'elle concernerait nos deux îles — qui n'y sont nullement mentionnées; mais pour une toute autre raison. Que dit en effet cette proclamation ? Entre autres, que tous les bateaux de pêche de British North Borneo doivent se faire immatriculer et que les licences de pêche doivent

indiquer les zones où cette autorisation est prévue; mais alors on aurait pu penser que la Malaisie nous — vous — inonderait de licences mentionnant Sipadan ou Ligitan (d'autant plus qu'elles devaient être renouvelées, tous les ans) ; mais non ! Elle n'en produit aucune.

25. Au lieu de cela (qui eût constitué une preuve d'effectivité, certainement pas décisive, mais pertinente), nous n'avons reçu que quelques affidavits (n^{os} 45 à 49) qui … valent ce qu'ils valent — c'est-à-dire peu de choses : il y est dit que les habitants de Si-Amil pêchaient, ou récoltaient des œufs de tortue, autour de ou sur Ligitan ou Sipadan; c'est vrai aussi de pêcheurs venus de la côte indonésienne (voir mémoire de l'Indonésie, par. 6.9, p. 104 et vol. 5, annexes I, J, K, L et M et contre-mémoire de l'Indonésie, annexe 31) ou même des Philippines (cf. l'affidavit de Panglima Nujum bin Panglima Abu Sari, n° 47, mémoire de la Malaisie, vol. 4, annexe 118, par. 5); ces documents ne sont jamais spécifiques quant à la date des événements qui y sont rapportés et certains, au surplus, enjolivent quelque peu la réalité — je pense par exemple à la jolie histoire contée par Tilaran Haji Abdul Majid au sujet de l'origine de «Sipadan» nommée d'après un mort inconnu … appelé Paran (n° 46, mémoire de la Malaisie, vol. 4, annexe 117, par. 11) ou à l'explication du développement de Semporna donnée par Datuk Panglima Abdullah Bin Panglima Uddang (n° 49, mémoire de la Malaisie, vol. 4, annexe 120, par. 3) qui cadre mal avec l'histoire réelle de la fondation de la ville de Semporna par les Anglais.

26. Outre ceux que j'ai cités il y a quelques instants, d'autres documents invoqués par la Malaisie à titre de preuve de ses «effectivités» doivent être écartés du fait que ni Pulau Ligitan, ni Pulau Sipadan n'y sont mentionnées. Tel est le cas, par exemple, de la proclamation de 1914 sur le commerce (n° 20 de la liste) ou de l'ordonnance du 28 juin 1963 renouvelant la proclamation d'une réserve d'oiseaux (n° 40), qui ont un caractère très général et ne mentionnent nullement nos deux îles. De même, la Malaisie reproduit une liste des chefs indigènes de la côte est de Nord-Bornéo de 1878 à 1909 (n° 17); on n'y trouve le nom d'aucune personne originaire de Ligitan ou de Sipadan — et pour cause ! — et ce document ne prouve strictement rien quant à la souveraineté territoriale de nos deux îles.

27. Le dossier des effectivités malaisiennes s'amenuise, Monsieur le président : il ne reste que trois épisodes concernant respectivement 1) la collecte des œufs de tortue, 2) la création d'une réserve d'échassiers et 3) la construction de lanternes lumineuses sur les deux îles — car c'est à

cela que se réduisent les effectivités dont la Malaisie voudrait vous faire tirer, Madame et Messieurs les juges, la conclusion qu'elle a un titre sur Ligitan et Sipadan. Je laisse en effet de côté l'épisode du *Quiros* (nos 14 et 15 de la liste) dont mon collègue et ami Rodman Bundy a montré qu'il ne présentait pas de pertinence à l'appel des prétentions malaisiennes. Quelques mots successivement sur ce qui reste.

b) *La collecte des œufs de tortues sur Sipadan*

28. La Partie malaisienne s'appuie sur vingt-deux documents à cet égard, mais je laisse de côté les affidavits, dont j'ai déjà parlé. Les dix-sept documents restants sont énumérés dans une liste figurant dans le dossier de plaidoiries sous le n° 50 qui est un extrait de la liste précédente. Je ne peux les passer en revue un à un; et il suffit d'ailleurs sans doute d'en dégager l'essentiel.

29. Selon la Malaisie, ces documents prouveraient que «*[b]oth Sipadan and Ligitan were the subject of a complex and regular pattern of use by the local people, whose own affiliation was to Sulu and (from 1878) to the BNBC*» (réplique de la Malaisie, p. 14, par. 2.17). C'est leur faire dire beaucoup — et beaucoup plus, assurément, qu'ils ne disent :

1) aucun ne mentionne le nom de Ligitan;

2) la conclusion contournée que je viens de citer est du reste révélatrice : il est sans doute exact que Sipadan était utilisée par certains habitants de Dinawan pour la collecte des œufs de tortues et que celle-ci a donné lieu à des litiges mais :

   — ils n'y étaient pas seuls (dans la relation du voyage du *Quiros* de 1903 par exemple, le lieutenant Boughter rapporte que des Bajau d'autres localités y ont «braconné» (*«have been poaching»*) et l'Indonésie a produit un témoignage établissant que certains d'entre eux venaient de l'île indonésienne de Derawan par exemple (n° 56);

   — la Malaisie tente de tirer parti du fait que l'auteur de cet affidavit (n° 56) explique avoir passé deux mois sur l'île à la demande d'un Bajau demeurant à Semporna (réplique de l'Indonésie, p. 14, note 41); c'est vrai – et cela prouve une seule chose : que la collecte des œufs de tortues est une affaire de tradition mettant en jeu des liens ethniques et familiaux et nullement une question de souveraineté;

— en tout état de cause, la présence intermittente sur l'île de populations venues de Dinawan n'est assurément pas de nature à établir les prétentions territoriales des autorités britanniques, pas davantage que celle de membres de la tribu des Masubia sur l'île de Kasikili/Sedudu n'a pu témoigner de la souveraineté de la Namibie sur celle-ci (cf. arrêt du 13 décembre 1999, *Île de Kasikili/Sedudu, C.I.J. Recueil 1999*, p. 1094-1095, par. 74 et p. 1105-1106, par. 98-99); à cet égard, la Malaisie doit «démontrer davantage que l'usage du territoire contesté à des fins privées» (*ibid.*, p. 1103, par. 94);

— il s'agissait en effet, selon la Malaisie elle-même (voir mémoire de la Malaisie, par. 6.9, p. 65; voir aussi réplique de la Malaisie, par. 5.14, p. 70) de Bajau Laut (n^{os} 18, 21, 22, 23, 25, 32 et 45) dont les liens avec le sultanat de Sulu (comme, du reste, avec ceux de Boeloengan et de Berou) et avec les puissances coloniales ne permettent de tirer aucune conclusion ferme quant à l'appartenance *territoriale* des zones où ils opéraient comme, je le répète, l'Indonésie l'a montré dans son contre-mémoire (p. 19-37, par. 3.23-3.73) sans être contredite.

3) Surtout, à l'exception de la *Turtle Ordinance* de 1917 (édictée à une période où la BNBC n'avait assurément aucun titre sur Sipadan), il s'agit exclusivement de documents réglant des disputes entre des résidents de Dinawan au sujet de la collecte des œufs ou leur reconnaissant le droit d'y procéder (documents n^{os} 18 à 23, 25, 29 à 33, 38 et 51); il y a là la preuve de la compétence *personnelle* exercée par la Compagnie sur la population de Dinawan, mais certainement pas de sa compétence *territoriale* sur Sipadan; dans l'affaire de l'*Île de Kasikili/Sedudu* toujours, la Namibie n'a pu convaincre la Cour que la présence intermittente des Masubia «au gré des saisons et selon leurs besoins, à des fins exclusivement agricoles» constituait une manifestation d'autorité à titre de souverain (*C.I.J. Recueil 1999*, p. 1105-1106, par. 98), alors même que leur établissement dans l'île était prouvé; il en va de même *a fortiori* s'agissant de la récolte occasionnelle invoquée par la Malaisie.

4) Au surplus, les documents sur lesquels la Partie malaisienne se fonde n'ont évidemment pas fait l'objet de publication et ne peuvent donc témoigner *publiquement* de la possession de l'île par la BNBC comme cela serait cependant indispensable pour contribuer à l'acquisition d'un titre par prescription. Or, il faut le redire, de l'aveu même de la Malaisie, la BNBC n'avait

aucun titre sur Sipadan jusqu'en 1930 (cf. mémoire de la Malaisie, p. 37, par. 5.12; contre-mémoire de la Malaisie, p. 54, par. 3.6, et p. 69, par. 3.29; réplique de la Malaisie, p. 1, par. 1.32)) en admettant même qu'elle en eût acquis un à cette date, ce qui n'est pas le cas.

30. Deux des documents invoqués par la Partie malaisienne sont cependant publics — deux seulement, Monsieur le président; il s'agit de la *Turtle Ordinance* de 1917 d'une part (n° 24 de la liste) et d'un document que la Malaisie présente comme une publication officielle de la BNBC (voir réplique de la Malaisie, p. 14, par. 2.15 et p. 72, par. 5.19) qui date de 1922, et qui mentionne la production des œufs de tortues de Sipadan (n° 26). Mais, si publications il y a, il est fort peu probable qu'elles soient parvenues, tout particulièrement en 1917, en pleine première guerre mondiale, à la connaissance des administrateurs néerlandais de la région qui, seuls, auraient pu être alertés sur l'empiètement des droits des Pays-Bas en résultant.

31. Peut-on, Madame et Messieurs de la Cour, raisonnablement déduire de la seule *Turtle ordinance*, unique document rendu public de quelque importance, adopté en pleine guerre mondiale, que la BNBC aurait pu acquérir un titre alors que les Parties s'accordent pour considérer qu'elle ne le détenait pas, même si c'est pour des raisons différentes (la Malaisie parce que la titre aurait, contre toute raison, été retenu par Sulu; l'Indonésie parce que ce titre a été reconnu aux Pays-Bas par la convention de 1891) ? Peut-on inférer le titre revendiqué par la Malaisie d'un document qui se borne à protéger les ressources naturelles de la région par la création au surplus d'une réserve indigène — ce qui renvoie aux coutumes locales davantage qu'au partage territorial colonial ? La réponse à cette question est évidemment, clairement, catégoriquement : non. Peut-être est-ce une effectivité — encore que l'on puisse nourrir quelque doute sur le fait que la BNBC ait agi «à titre de souverain» et penser qu'il s'agissait, bien plutôt, de la préservation d'intérêts commerciaux. Mais, de toute manière, elle ne saurait suffire à déplacer un titre pré-existant; ni même à l'établir *de novo* — mais cette seconde question ne se pose pas : la Malaisie en convient, nous ne sommes pas en présence d'une *terra nullius*.

32. Mais il y a autre chose : les deux seuls documents publics invoqués par les écritures malaisiennes à titre d'effectivités datent respectivement de 1917 et 1922; à nouveau à un moment où la Malaisie reconnaît que la BNBC n'avait aucun titre sur les deux îles — puisque celui-ci aurait (toujours selon la Malaisie) été acquis des Etats-Unis par la Grande-Bretagne en 1930; de plus,

en 1921, les Hollandais avaient clairement réaffirmé leur titre sur les deux îles comme le montre l'important incident du *Lynx* dont a parlé le professeur Soons. Il est du reste significatif que le sultan de Sulu qui, selon la Malaisie, détenait toujours le titre territorial sur les deux îles, n'ait pas davantage protesté. Au surplus, à cette occasion, les Néerlandais ont effectivement foulé le sol de Sipadan, alors que, pour leur part, les Britanniques n'y ont, à l'évidence, jamais eu la moindre présence effective sur le terrain; et, il faut le souligner, la Malaisie ne fournit pas la moindre preuve que la *Turtle Ordinance* de 1917 ait reçu ne fût-ce qu'un début de commencement d'exécution sur Sipadan.

c) *La proclamation d'une réserve d'échassiers à Sipadan*

33. L'établissement d'une réserve d'oiseaux *(«bird sanctuary»)* ou, plus précisément, d'échassiers *(megapodes)*, sur Sipadan conduit au même genre de constatations. Ceci concerne trois documents (n^{os} 27, 28 et 40) énumérés sous l'onglet n° 51 des dossiers de plaidoiries, dont, à nouveau, aucun ne mentionne Ligitan.

34. Les deux premiers datent respectivement du 19 décembre 1932 et du 1er février 1933. Il en résulte que, sur proposition du conservateur des forêts de Sandakan (n° 27), Sipadan «est réservée à des fins de réserves d'oiseaux» *(reserved for the purpose of bird sanctuaries)* (n° 28). Quant à l'ordonnance de 1963 reconduisant et amendant la «loi pour la protection et la conservation de certaines espèces d'animaux sauvages et d'oiseaux» *(law for the protection and conservation of certain species of wild animals and birds)* (n° 40), d'une part elle fait référence à une «loi», dont rien ne dit qu'il s'agit de l'ordonnance de 1930 (à laquelle se réfèrent les deux documents que je viens de citer) et, d'autre part, comme la Malaisie ne fournit pas le texte intégral de cette ordonnance, il est impossible de s'assurer qu'elle n'énumère pas limitativement les zones et les îles auxquelles elle s'applique — mais une chose est certaine, cette ordonnance ne mentionne pas Sipadan.

35. Le plus important est cependant ailleurs : la Malaisie, qui a pourtant, visiblement, «épluché» attentivement toutes les archives pertinentes, ne fait pas état de la moindre mesure concrète d'exécution. Dans sa réplique, elle s'indigne que l'Indonésie ait mis en doute que la décision de 1932 révélât une intention d'agir «à titre de souverain» (réplique de l'Indonésie, p. 74,

par. 5.22); tel est pourtant le cas : cette décision n'a pas été mise en œuvre sur le terrain; elle n'a eu aucun effet territorial; elle n'est pas une «pratique»; elle est demeurée, au mieux, une «effectivité virtuelle».

36. Au surplus, la carte du district de Semporna, annexée au mémoire malaisien, dont vous pouvez, Madame et Messieurs les juges, voir une reproduction dans vos dossiers sous l'onglet 52 et qui est projetée derrière moi, établit que les Britanniques avaient conscience que Ligitan et Sipadan ne relevaient pas de leur juridiction dont les limites apparaissent nettement sur la carte. La Malaisie tente de minimiser l'importance de cette carte (réplique de la Malaisie, p. 73, par. 5.21) au prétexte que d'autres îles, que l'Indonésie ne tient pas pour siennes, y figurent en dehors des limites administratives du district de Semporna; la constatation est exacte mais n'enlève rien au fait que Sipadan, bien que mentionnée comme *«Bird Sanctuary»* est «hors administration» britannique; la décision de 1933 apparaît donc comme une espèce de réglementation extra-territoriale; ceci conduit, assurément à rendre hommage à la prescience des autorités britanniques qui s'efforçaient de protéger l'environnement dans l'intérêt commun à une époque où ce n'était pas une préoccupation habituelle, mais certainement pas à considérer cette réglementation comme une action «à titre de souverain». D'action, d'ailleurs, je l'ai dit, il n'y a pas la moindre trace.

d) *La construction et l'entretien des lanternes lumineuses*

37. La Malaisie se prévaut enfin de la construction de phares sur les deux îles — phares est d'ailleurs peut-être un bien grand mot : si l'on se réfère aux photographies communiquées par la Malaisie (mémoire de la Malaisie, p. 22 et 25), il s'agit de structures métalliques légères, surmontées d'une lanterne. Ceci étant, il est exact qu'elles furent construites par les Britanniques respectivement en 1962 et 1963 et firent l'objet d'une certaine publicité comme le montrent cinq documents produits par la Malaisie (nos 34 à 37, et 41 de la liste); du reste, les Indonésiens n'ont jamais prétendu en ignorer l'existence (comme le montrent les documents nos 43, 54 et 55; voir aussi mémoire de l'Indonésie, vol. 4, annexe 142). La liste des documents pertinents se trouve sous l'onglet 53 des dossiers de plaidoiries. Ce sont, en apparence, les seules véritables effectivités dont la Malaisie peut se prévaloir. Il reste que leur portée est fort limitée.

38. Il est en effet de jurisprudence que la construction et l'entretien de phares ne constituent pas, en elles-mêmes, la preuve de la volonté d'agir à titre de souverain. La Malaisie ne le conteste pas mais affirme que les précédents cités dans le contre-mémoire indonésien (p. 134-135, par. 7.40-7.43) s'expliquent seulement par les circonstances propres à l'espèce (réplique de la Malaisie, p. 74-75, par. 5.25-5.26). Ce n'est pas l'opinion du Tribunal arbitral qui a tranché l'affaire *Erythrée-Yémen* et qui a considéré d'une manière générale (et non pas, comme le prétend la Malaisie, en relation avec les circonstances de l'espèce) que «*[t]he operation or maintenance of lighthouses and navigational aids is normally connected to the preservation of safe navigation, and not normally taken as a test of sovereignty*» (première phase, sentence du 9 octobre 1998, p. 87, par. 328); du reste, l'histoire détaillée de la construction et de la maintenance des phares de la mer rouge, qui est relatée au chapitre VI de la sentence *Erythrée-Yémen* (p. 57-65, par. 200-238), montre que la question de la souveraineté sur les îles concernées a toujours été dissociée, volontairement ou *de facto*, dans l'affaire *Erythrée-Yémen*, de l'établissement et de l'entretien des phares. De même, dans l'affaire des *Minquiers et des Écréhous*, la Cour a estimé que le fait que le Gouvernement français eût «assumé seul la charge de l'éclairage et du balisage des Minquiers pendant plus de soixante-quinze ans, sans avoir rencontré aucune objection de la part du Gouvernement du Royaume-Uni» ne démontrait pas «que la France ait un titre valable aux Minquiers» et ne saurait être considéré «comme une manifestation de l'autorité étatique sur les îlots» (arrêt du 17 novembre 1953, *C.I.J. Recueil 1953*, p. 71).

39. L'une des raisons de cette position tient à ce que la France avait agi «dans le but d'aider la navigation à l'entrée et à la sortie des ports français et de protéger les bateaux contre les dangereux récifs des Minquiers» (*ibid.*, p. 70). Exactement comme, dans l'affaire qui nous occupe, les Britanniques ont procédé à la construction des «phares» («*lights*») à Ligitan et Sipadan *in order «to assist navigation of vessels between Tawau and Sandakan using the Alice Channel route between Tawau and Sandakan, [or] secondary routes on the inshore channel for the Tawau/Semporna route»* (document n° 34 de la liste) — ces routes maritimes intéressent exclusivement le cabotage interne à la colonie de North Borneo et maintenant à la Malaisie.

40. Dans ces conditions, il n'y a pas lieu de s'étonner que l'Indonésie n'ait pas protesté contre l'établissement des deux lanternes sur des îles inhabitées ne présentant pas d'importance

pour le trafic local indonésien ou international. Au surplus, leur construction est intervenue alors que l'Indonésie connaissait une situation politique difficile. J'ajoute d'ailleurs que, non seulement l'Indonésie n'a pas protesté, mais qu'elle a, expressément, donné son accord à l'entretien des deux phares (en tout cas de celui établi à Sipadan) par la Malaisie comme le montre la note verbale du 7 mai 1988 par laquelle le ministère indonésien des affaires étrangères proteste avec vigueur contre l'invasion touristique de Sipadan organisée par la Malaisie et rappelle qu'à l'issue des négociations de 1969,

> *«the two sides agreed to temporarily set aside the question [of ownership or title of the islands of Sipadan and Ligitan] and to maintain the status quo on the islands (no activities except for maintaining a lighthouse at the easternmost part of Sipadan)»*
> (mémoire de l'Indonésie, vol. 4, annexe 142; souligné par nous).

41. Cette situation n'est pas sans rappeler celle du phare de l'île de Taganak dans le groupe des Turtle Islands évoqué tout à l'heure par M. Bundy. Ce phare a été construit par la BNBC à des fins d'aide à la navigation — *«as an aid to navigation»* (réplique de l'Indonésie, vol. 2, annexe 16; voir aussi annexe 18) au début du XX^e^ siècle, à un moment où les Britanniques n'avaient aucune souveraineté territoriale sur l'île, ainsi qu'ils l'ont expressément reconnu par la suite (cf. réplique de l'Indonésie, vol. 2, annexe 13 ou 16). Comme le montre ce précédent, la construction d'un phare dans l'intérêt de la seule navigation locale ne préjuge nullement, par elle-même, de la souveraineté; tout au plus peut-elle donner lieu à compensation dans la mesure où il s'agit d'une manière de service public international (cf. l'échange de notes joint à la convention du 2 janvier 1930, mémoire de l'Indonésie, vol. 4, annexe 12[illegible]).

e) *Conclusion provisoire sur les effectivités*

42. En résumé, Monsieur le président, la possession dont se prévaut la Malaisie n'a été exercée ni à titre de souverain, ni de façon ininterrompue, ni de manière publique.

43. Elle n'a pas été publique. Comme le précise David Johnson, dans un article qui fait autorité sur la prescription acquisitive en droit international, dont il est partisan, *«[p]ublicity is essential because acquiescence is essential»* («Acquisitive Prescription in International Law», *BYBIL* 1950, p. 347; voir aussi Ian Brownlie, *Principles of International Law*, Clarendon Press, Oxford, 1998, p. 155). En d'autres termes, la présence effective de l'État qui s'en prévaut doit être suffisamment ouvertement publique pour que les États invoquant un titre concurrent puissent

protester. Tel n'est le cas d'aucune des quelques «effectivités» invoquées par la Malaisie. Et l'Indonésie n'avait aucune raison de protester contre des activités traditionnelles de pêche ou de collecte non plus que contre la construction de lanternes visant à faciliter la navigation malaisienne dans la région.

44. La possession dont se prévaut la Malaisie n'a pas non plus été «à titre de souverain». La *Turtle Ordinance* de 1917 et les «arbitrages» effectués par la BNBC entre les prétentions contradictoires des Bajau de Dinawan relèvent d'activités commerciales et privées et, en tout état de cause, prennent place à une époque où la Partie malaisienne elle-même ne conteste pas que la BNBC n'avait aucune souveraineté sur Ligitan et Sipadan; elle ne saurait donc avoir agi «à titre de souverain». Il en va de même s'agissant de l'inclusion de Sipadan dans une réserve d'échassiers, décision qui n'a été suivie d'aucune manifestation concrète d'autorité sur cette île, ou de la construction et de l'entretien de lanternes qui, en tant que tels, ne constituent pas des manifestations d'autorité souveraine.

45. Et cette prétendue possession malaisienne — qui ne s'est donc traduite par aucune présence effective sur les îles jusqu'à la fin des années 1980, après la naissance du présent différend — n'a pas davantage été ininterrompue. Même en admettant que les quelques effectivités mises en avant avec tant d'insistance par la Malaisie fussent pertinentes, ce qu'aucune n'est réellement comme je pense l'avoir établi, elles sont remarquablement espacées dans le temps comme le montre le document n° 49 du dossier des juges.

46. Je me permets de rappeler à cet égard, Madame et Messieurs les juges, que nous avons inclus dans cette liste *toutes* les soi-disant preuves d'effectivités invoquées par la Malaisie dans l'ensemble de ses trois volumes d'écritures. Or que constate-t-on?

— qu'aucun des documents antérieurs à 1903 ne mentionne les deux îles; quant aux documents de 1903 (n^{os} 14 et 15) ils sont relatifs au voyage du *Quiros* et reposent sur une erreur reconnue ensuite par les autorités américaines comme M. Bundy l'a montré hier;

— on constate aussi que la Malaisie se prévaut de quelques disputes internes relatives à la collecte des œufs de tortues entre 1910 et 1917 date de la *Turtle Ordinance* (n° 18 à 24 de la liste); deux documents concernent ensuite les années 1918 et 1922 (n^{os} 25 et 26) et puis

— plus rien jusqu'en 1931-1933, date des deux documents relatifs à la réserve d'oiseaux (n^{os} 27 et 28); et

— à nouveau un trou de plus de vingt ans lorsque l'on retrouve, en 1954, quelques manifestations de pseudo-effectivités entre 1954 et 1963 (n^{os} 29 à 42).

En d'autres termes : de l'aveu même de la Malaisie, aucune manifestation d'effectivité jusqu'en 1910; rien de nouveau pendant une dizaine d'années entre 1922 et 1931; et rien encore pendant plus de vingt ans entre 1933 et 1954. Est-il raisonnable de parler de «possession continue»?

47. Plus significatif encore : durant la période coloniale, de 1963 à 1969, la Malaisie n'est en mesure d'invoquer *aucune* effectivité jusqu'en 1988 — c'est-à-dire une vingtaine d'années après que le différend eut éclaté au grand jour. A partir de cette date, au contraire, elle tente de se forger une possession — mais il est juridiquement trop tard comme je le montrerai tout à l'heure lorsque j'opposerai les effectivités indonésiennes à l'absence d'effectivités malaisiennes sérieuses.

48. Monsieur le président, pour autant que je les comprenne, les thèses malaisiennes, qui ne sont pas sans rappeler, *mutatis mutandis*, celles que la Namibie avait tenté de faire valoir devant la Cour dans l'affaire de *Kasikili/Sedudu* (cf. arrêt du 13 décembre 1999, *C.I.J. Recueil 1999*, p. 1092, par. 71), très largement, et, pour l'une d'entre elles, la principale semble-t-il, exclusivement, sur les effectivités dont la Malaisie se prévaut. Pour comprendre leurs effets potentiels, il est utile de se reporter à nouveau à ce que la Malaisie présente, dans sa réplique, comme les deux «chaînes» de son argumentation — *the two strands of Malaysia's case* (réplique de la Malaisie, p. 66).

49. Selon la première, le sultan de Sulu avait conservé la «souveraineté» sur Pulau Ligitan et Pulau Sipadan et celle-ci n'est passée à la Grande-Bretagne qu'avec le traité anglo-américain de 1930. Pour que la revendication malaisienne soit convaincante, deux conditions, cumulatives (et non alternatives), devraient être remplies : il faudrait d'une part que la «souveraineté» de Sulu sur les îles fût établie et, d'autre part, que le traité de 1930 portât sur les îles revendiquées par la Malaisie. Nous avons montré hier que ni l'une ni l'autre de ces hypothèses n'était vérifiée. Dès lors, les prétendues effectivités dont la Malaisie se prévaut ne pourraient avoir de signification juridique que si elles avaient déplacé le titre conventionnel appartenant à l'Indonésie par l'effet d'une prescription acquisitive qui, en admettant qu'elle fût reçue en droit international — ce que, je

le répète, nous ne croyons pas —, suppose des manifestations d'autorité effective à titre de souverain autrement plus convaincantes que celles invoquées par la Malaisie.

50. Au surplus, nos contradicteurs se heurtent à une autre difficulté, au moins durant la période antérieure à 1930 puisque les prétendues effectivités de la BNBC sont contraires au soi-disant titre territorial appartenant au sultan de Sulu. Il s'agirait donc d'effectivités *contra legem*, qui, de l'aveu même de la Partie malaisienne (cf. réplique de la Malaisie, p. 20, par. 2.26), n'ont pas déplacé le titre Sulu. Les deux seules effectivités dont la Malaisie se prévaut durant cette période — la collecte d'œufs de tortues sur Sipadan par des Bajau de Dinawan (collecte dont ils n'avaient du reste pas le monopole) et la *Turtle Ordinance* de 1917 — se trouvent donc juridiquement discréditées.

51. Ne restent donc que la décision d'inclure Sipadan dans la réserve d'échassiers créée par l'ordonnance de 1930 (et qui n'a fait l'objet d'aucune exécution concrète) et la construction des deux lanternes. Ce n'est assurément pas suffisant pour déplacer le titre que l'Indonésie tient de la convention de 1891 ni pour établir un titre par occupation — ce qui correspond à la seconde «chaîne» d'argumentation malaisienne (réplique de la Malaisie, p. 68, par. 5.6), qui n'est, de toute manière, pas compatible avec la conviction, partagée par les Parties, selon laquelle les deux îles n'étaient pas *terrae nullius*.

Monsieur le président, je me propose de parler tout à l'heure, avec votre autorisation, des effectivités et des conduites mutuelles des Parties qui confirment le titre indonésien. Auparavant, Mme Loretta Malintoppi va, si vous voulez bien lui donner la parole, s'intéresser aux cartes invoquées de part et d'autre et à leur signification juridique. Je crois savoir qu'elle est prête soit à commencer maintenant, soit après la pause, comme il vous plaira.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La Cour va interrompre pour une suspension de séance d'une dizaine de minutes.

L'audience est suspendue de 11 h 25 à 11 h 35.

Le PRESIDENT : Veuillez vous asseoir. La séance est maintenant reprise, et je donne la parole à Mme Loretta Malintoppi.

Mme MALINTOPPI : Merci, Monsieur le président.

L'IMPORTANCE DE LA CARTOGRAPHIE DANS L'AFFAIRE INDONÉSIE/MALAISIE

I. Introduction

1. Monsieur le président, Madame et Messieurs de la Cour, c'est pour moi un grand honneur de paraître devant vous aujourd'hui au nom du Gouvernement de la République d'Indonésie.

2. Le but de cet exposé est d'examiner les éléments de preuve cartographiques évoqués par les deux Parties dans leurs écritures et d'en évaluer l'importance dans le contexte juridique de la présente affaire. Dans cette tâche, je serai assistée par M. Robert Rizzutti et M. Charles Claypoole que je remercie pour leur collaboration.

3. Avant d'aborder une description détaillée des cartes, je souhaiterais souligner un point sur lequel il n'y a pas de désaccord entre les Parties : c'est le fait que la cartographie ne peut pas constituer en soi un titre territorial. Toutefois, il est certain que les cartes sont un des moyens par lesquels les parties expriment leur conviction quant à l'étendue d'un titre territorial. Elles peuvent, dans cette mesure, aider à clarifier la situation juridique.

4. Dans la présente affaire, l'Indonésie est d'avis que les cartes peuvent confirmer le titre territorial établi par la convention de 1891 entre la Grande-Bretagne et le prédécesseur en titre de l'Indonésie, les Pays-Bas. Les cartes représentent en l'espèce un aspect du comportement des Parties qui peut, pour emprunter les mots de la Chambre de la Cour dans l'affaire du *Différend frontalier*, conforter «une conclusion à laquelle le juge est parvenu par d'autres moyens» (*Différend frontalier, C.I.J. Recueil 1986*, p. 583, par. 56).

5. Dans ce contexte, la cartographie pertinente en l'espèce est utile sur plusieurs plans. *Premièrement*, certaines cartes versées au dossier par les Parties témoignent de l'état des connaissances quant aux limites de la souveraineté des Etats prédécesseurs dans la région. Selon ces cartes, les îles qui forment l'objet du différend faisaient partie des possessions territoriales des Pays-Bas. *Deuxièmement*, les éléments cartographiques de l'espèce fournissent la preuve des intentions des parties concernant le tracé établi par la convention de 1891. *Troisièmement*, la

cartographie postérieure à la signature de cette convention peut servir d'élément de preuve de la pratique ultérieure des parties.

6. *Enfin*, un très grand nombre de cartes officielles publiées par la Partie malaisienne après son indépendance montrent une ligne qui ne s'arrête pas à l'île de Sebatik, mais s'étend au large de cette dernière, en contredisant la position actuelle de la Malaisie. Ces cartes malaisiennes constituent autant de preuves de l'interprétation que la Malaisie donnait à la ligne définie par la convention de 1891. Elles représentent donc toute une série d'allégations qui vont à l'encontre des intérêts de la Partie adverse — c'est-à-dire *admissions against interest* — par lesquelles la Malaisie a acquiescé à la position indonésienne.

7. C'est sans doute ce qui explique que la Malaisie traite la cartographie d'un ton plutôt dédaigneux. Elle affirme que les cartes — auxquelles elle accorde pourtant de l'importance lorsque, par extraordinaire, elles peuvent être interprétées en faveur de sa thèse — ne sont pas décisives en l'espèce. La Malaisie soutient que ses revendications sont fondées sur une «*chain of title*», une série de titres successifs, sur les effectivités coloniales et sur le fait que les îles étaient sous l'administration malaisienne. Elle considère que ses revendications ne reposent pas sur des éléments de preuve cartographiques, car, selon elle, ces derniers ne feraient pas toujours apparaître la prolongation de la ligne au-delà de l'île de Sebatik et — en tout état de cause, d'après la Malaisie — ils ne permettraient pas de conclure que les îles dépendent de la souveraineté de l'Indonésie (contre-mémoire de la Malaisie, p. 120-121, par. 5.37-5.38).

8. Pourtant, Monsieur le président, l'importance de la cartographie en l'espèce est indéniable. En effet, cette affaire se caractérise par la présence, sur un très grand nombre de cartes officielles provenant de sources différentes, d'une ligne traversant l'île de Sebatik et continuant en direction de l'est vers le large, dans la mer de Célèbes.

9. Le même tracé est reproduit de carte en carte, à partir de 1891, date de la signature de la convention anglo-néerlandaise. La présence récurrente de cette ligne est un élément de cette affaire que la Malaisie est incapable d'expliquer. La seule explication hasardée par la Malaisie est qu'il s'agit d'une ligne représentant la frontière de la mer territoriale (contre-mémoire de la Malaisie, vol. 1, p. 102, par. 5.12). Cette affirmation est d'autant plus surprenante que la Malaisie ne se donne pas la peine de la justifier de quelque manière que soit.

10. Monsieur le président, il n'y a pas à chercher bien loin pour comprendre d'où vient cette ligne qui apparaît et réapparaît au fil des années — et ce même sur les cartes malaisiennes. Elle ne peut avoir qu'une source, c'est la convention de 1891.

11. Après cette brève introduction, je me permettrai de passer à l'examen des cartes. Bien entendu, Monsieur le président, je n'entends pas vous infliger à nouveau tout le matériau cartographique qui est joint aux écritures des Parties. Je me bornerai à commenter les cartes les plus significatives qui confirment le titre territorial hérité par l'Indonésie sur les îles de Sipadan et Ligitan. S'agissant des cartes qui ne seront pas examinées au cours de cet exposé, je me permets de renvoyer la Cour à nos écritures (mémoire de l'Indonésie, atlas, cartes 1, 2, 3, 4, 6, 7, 8, 9, 15, 21, 22, 23, 24; contre-mémoire de l'Indonésie, cartes 4-9).

12. Je voudrais tout d'abord examiner la cartographie pertinente en ordre chronologique, tout en gardant les différentes rubriques sous lesquelles l'Indonésie classe ce matériau. Ensuite, j'analyserai brièvement les cartes produites par la Malaisie et je conclurai par quelques remarques générales sur les prétentions malaisiennes relatives à la cartographie.

II. Les cartes qui traduisent l'opinion des signataires sur l'interprétation de la convention de 1891

a) *Les cartes antérieures à la convention de 1891*

13. Monsieur le président, Madame et Messieurs de la Cour, la genèse de la présente affaire a déjà été exposée. Nous avons donc vu comment, lors des négociations qui ont abouti à la conclusion de la convention de 1891, les Pays-Bas et la Grande-Bretagne ont convenu que la ligne de partage de leurs possessions respectives suivait le parallèle de latitude 4° 10' nord et qu'elle continuait le long de ce parallèle dans la direction de l'est au-delà de l'île de Sebatik.

14. Le professeur Pellet a rappelé l'importance des cartes et des croquis échangés par les parties au cours de ces négociations. Son exposé démontre de façon éloquente la valeur juridique qu'il convient d'attribuer à ce matériau cartographique et je n'y ajouterai que peu de choses. Je me bornerai à rappeler que ces cartes servaient à illustrer les positions respectives des Etats parties lors de la conclusion de la convention. Elles ne laissent donc subsister aucun doute quant à leurs

intentions, à savoir que la ligne d'attribution territoriale entre elles devait traverser l'île de Sebatik et, au-delà, continuer vers le large.

15. En effet, il est évident que, lors des négociations de la convention de 1891, les négociateurs britanniques envisageaient une ligne de partage territorial s'étendant au-delà de la terre ferme et bien au-delà de l'île de Sebatik.

16. Les négociateurs néerlandais, de leur côté, avaient eux aussi préparé des croquis qui évoquaient la même notion de partage territorial. Ces cartes confirment également que les parties à la convention de 1891 avaient de toute évidence prévu que l'attribution territoriale se prolongerait au-delà de l'île de Sebatik. Ainsi, contrairement à ce que prétend la Malaisie, cette idée n'a rien de «fantaisiste» *(imaginary)*, mais c'est exactement ce dont les parties sont convenues à l'article IV de la convention de 1891, et comme sir Arthur Watts l'a démontré hier, c'est précisément ce qui a été représenté sur la carte annexée au «Mémorandum explicatif» néerlandais.

b) *La carte annexée au «Mémorandum explicatif» néerlandais*

17. Cette carte, qui apparaît à l'écran et a été incluse dans les dossiers de plaidoiries sous la cote n° 8 (mémoire de l'Indonésie, atlas, carte 5), a une importance toute particulière dans cette affaire. Elle traduit de façon claire l'intention commune des parties et l'existence d'un consensus entre les deux Etats concernés à propos du tracé de la ligne établie par la convention de 1891.

18. A l'instar de la carte contenue dans le *Livre Jaune* de l'affaire *Libye/Tchad*, cette carte annexée au «Mémorandum explicatif» témoigne de l'interprétation officielle, publique et contemporaine, par les autorités néerlandaises, du tracé prévu par cette convention.

19. A cet égard, on pense aussi au passage bien connu de la sentence dans l'affaire du *Canal de Beagle* où le tribunal arbitral observait :

> *«Thus maps or charts in existence previous to the conclusion of the Treaty in 1881 might be relevant if, in the circumstances, they could (for instance) throw light on the intentions of the Parties, or give graphic expression to a situation of fact generally known at the time or within the actual, or to be presumed, knowledge of the negotiators. Equally, maps published after the conclusion of the Treaty can throw light on what the intentions of the Parties in respect of it were, and, in general, on how it should be interpreted.»* (*Beagle Channel*, *ILR*, vol. 52, 1979, p. 202.)

20. La carte annexée au «Mémorandum explicatif» s'inscrit donc parfaitement dans le raisonnement suivi par le tribunal arbitral dans l'affaire du *Canal de Beagle*, notamment parce

qu'elle rapporte un témoignage concernant — pour reprendre les termes de la sentence en français — «la position adoptée à l'époque par l'une ou l'autre Partie à propos du règlement résultant du traité».

c) *Les cartes officielles publiées après la conclusion de la convention de 1891*

21. Quant aux cartes publiées après la conclusion de la convention de 1891 — et tout particulièrement celles du cartographe officiel de la British North Borneo Company, Stanford — elles confirment que le tracé de la ligne qui résulte de la convention traverse l'île de Sebatik et, suivant le parallèle de 4° 10' de latitude nord, continue au large de la côte occidentale de Sebatik, alors que les deux îles en litige sont au sud de ce parallèle.

22. Le professeur Soons a souligné notamment que, sur les cartes dressées par Stanford en 1894, 1903 et 1904, figurait une ligne de partage entre les possessions néerlandaises et britanniques; et que cette ligne traversait l'île de Sebatik et continuait au large de cette dernière plusieurs milles à l'est des îles de Sipadan et Ligitan.

23. Ces cartes montrent de façon évidente que Stanford avait tenu compte de la délimitation territoriale intervenue à la suite de la conclusion de la convention. Elles représentent le point de vue de l'entité administrante sur l'étendue de ses compétences territoriales. Les cartes publiées par Stanford ne contiennent aucune réserve dont on pourrait déduire l'inopposabilité de la ligne frontière à l'organisme dont elles émanent. Par conséquent, il est clair que Stanford — et donc la BNBC — estimaient que, selon la convention de 1891, la ligne du parallèle de 4° 10' nord marquait la limite des possessions territoriales de la BNBC sur l'île de Bornéo et dans la mer de Célèbes.

24. Monsieur le président, je souhaiterais maintenant mentionner très rapidement trois autres cartes de source britannique, toutes trois postérieures à 1891, qui ne peuvent être réconciliées avec la position actuelle de la Malaisie. La première est une carte secrète de Bornéo du Nord publiée par la section géographique de l'état-major britannique pendant la seconde guerre mondiale, en 1944 (contre-mémoire de l'Indonésie, carte A.2). Elle apparaît à l'écran et porte le n° 54 dans les dossiers de plaidoiries. Manifestement, la Grande-Bretagne estimait que le tracé de la frontière aux termes de la convention ne s'arrêtait pas à Sebatik. Sous cet aspect, le point de vue britannique, représenté sur cette carte de 1944, ne diffère pas de celui de l'Indonésie d'aujourd'hui.

25. Il convient de souligner, en outre, que la ligne qui apparaît sur la carte secrète de 1944 est loin d'être unique. Par exemple, la carte qui apparaît maintenant à l'écran — et qui porte le n° 55 dans vos dossiers — contient la même représentation graphique de la ligne de la convention de 1891. La carte a été publiée par le ministère de la défense britannique en 1973 sous le titre de «*Tactical Pilotage Chart*» (mémoire de l'Indonésie, atlas, carte 19).

26. Comme la Cour peut le voir, la ligne tracée par la convention de 1891 traverse l'île de Sebatik et continue vers l'est, une fois passé la côte orientale de cette île. Ce qui soulève plusieurs questions : d'où vient cette ligne ? Que signifie-t-elle ? Pourquoi, si l'on s'aligne sur la thèse malaisienne, la ligne ne s'arrête-t-elle pas à la côte est de Sebatik ?

27. La Partie malaisienne est frappée de mutisme sur ces points. En vérité, il n'y a qu'une explication : la ligne figurant sur ces cartes confirme que l'interprétation indonésienne du tracé de 1891 est la seule possible et la seule plausible, qu'elle est — en effet — la seule conforme à la vérité.

28. La troisième carte britannique que je souhaiterais vous montrer contient des aspects intéressants à un autre titre. Elle a été dressée par le *Survey Department* de la colonie de Bornéo du Nord en 1953 (mémoire de l'Indonésie, atlas, carte 10). Elle est à l'écran et est reproduite au n° 56 dans vos dossiers. La carte montre en jaune le territoire de la colonie britannique de Bornéo du Nord, la terre ferme comme les îles. Les limites des différentes provinces qui composent la colonie y sont marquées par des lignes noires en pointillé. Une de ces lignes s'arrête sur la côte est de l'île de Sebatik et une autre descend au sud de la localité dénommée Kiraz et s'arrête juste au nord des îles de Sipadan et Ligitan à une latitude qui ne peut que correspondre au parallèle 4° 10' nord. Même si la ligne traversant l'île de Sebatik ne continue pas au-delà de cette dernière, la carte ne laisse pas de doute quant au fait que l'étendue de l'administration britannique de Bornéo du Nord ne couvre pas les territoires situés au sud de la ligne tracée en 1891.

29. Avant d'en terminer avec cette carte, permettez-moi une observation : il est pour le moins surprenant de constater, si l'on suit la thèse de nos adversaires, que les îles de Sipadan et Ligitan n'apparaissent tout simplement pas sur cette carte. Elles n'y sont donc nullement représentées, comme le sont nombre d'autres îles, grandes ou petites, comme faisant partie de la colonie de Bornéo du Nord.

Un troisième groupe de cartes, toutes d'origine malaisienne, restent à examiner. Ce sont :

III. Les cartes publiées par la Malaisie indépendante qui contredisent sa position actuelle

30. Après son indépendance, en 1963, et même après 1969, date à laquelle le différend est survenu, la Malaisie a produit un grand nombre de cartes officielles représentant une ligne qui se prolonge au large de la côte est de l'île de Sebatik. Ces cartes datent des années 1964 à 1974. Elles traduisent une pratique constante qui représente le point de vue du Gouvernement malaisien quant au tracé établi par la convention de 1891.

31. Cette production massive et concordante de cartes officielles émanant du Gouvernement malaisien ne peut qu'entraîner des conséquences juridiques.

32. La décision rendue par la commission frontalière dans l'affaire *Erythrée-Ethiopie* le 13 avril dernier évoque la question des cartes officielles publiées par une des parties à un différend frontalier. Il résulte de la décision notamment que des conséquences significatives sur le plan juridique doivent être attribuées à une carte produite par un organe gouvernemental officiel de la partie qui en subit les conséquences négatives si cette carte n'a pas été protestée par la partie en question (*Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, p. 26, par. 3.21).

33. D'ailleurs, cette sentence arbitrale n'est pas isolée. La jurisprudence internationale affirme que les cartes produites par l'une des parties au procès n'y sont opposables en tant qu'affirmations allant à l'encontre de ses intérêts *(admissions against interest)* dès lors qu'elles contredisent la position prise par cette partie au cours du litige. Il suffit de rappeler ici les affaires des *Minquiers et des Ecréhous* et *Burkina Faso/République du Mali*, ainsi que les arbitrages de *l'Ile de Palmas*, de la *Frontière du Labrador*, de *La Laguna del Desierto* et *Erythrée/Yémen*. Le comportement de la Malaisie, on l'a vu, fournit la preuve de l'existence d'un accord des parties au sens de l'article 31, paragraphe 3 *b)* de la convention de Vienne sur le droit des traités quant à la portée de la convention de 1891 et en particulier de l'emplacement de la ligne établie par son article IV.

34. Que dit la Malaisie au sujet de ces cartes ? Sa défense est plutôt faible; elle soutient que cette cartographie serait «generalized» ou peu détaillée et que ces cartes contiennent des réserves,

des «disclaimers». S'il est vrai que parfois ces cartes sont assorties de réserves quant au tracé exact des frontières, il est aussi vrai que de nombreuses cartes ne contiennent aucune clause de ce genre. En outre, il est de toute manière indiscutable que la présence éventuelle de ces réserves serait sans effet sur la valeur probatoire de ces cartes à l'appui de la position malaisienne quant au tracé de la ligne dans une période «non suspecte», c'est-à-dire pendant la période qui a précédé le litige.

35. La commission frontalière dans l'affaire *Erythrée-Ethiopie* a eu l'occasion de s'exprimer sur la question des réserves contenues dans des cartes dont certains éléments sont défavorables à l'Etat qui les a publiées. Voilà ce que la commission a remarqué dans sa décision à ce sujet :

> *«As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. The map still stands as a statement of geographical fact, especially when the State adversely affected itself produced and disseminated it, even against its own interest. The disclaimers may influence the decision about the weight to be assigned to the map, but they do no exclude its admissibility.»* (*Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, p. 28, par. 3.27.)

36. Par ailleurs, et ceci nous semble l'aspect le plus important à cet égard, la Malaisie ne fournit aucune explication de la présence dans toutes ces cartes (couvrant une période de plusieurs années) d'un élément commun tout à fait remarquable : la ligne qui traverse l'île de Sebatik s'étend bien au-delà de cette île suivant le parallèle de latitude 4° 10'.

37. Mieux vaut, à présent, laisser la parole aux cartes. La première (au n° 57 dans vos dossiers; mémoire de l'Indonésie, atlas, carte 11) a été établie en 1964 par le *Survey Department* du ministère de la défense britannique pour la direction nationale des cartes de Malaisie — qui est un organe gouvernemental malaisien. Elle s'intitule «*Pulau Sebatik*». Le tracé de la ligne de 1891 y est représenté de la façon habituelle, c'est-à-dire, traversant l'île de Sebatik et continuant vers l'est le long du parallèle de 4° 10' de latitude nord. Il convient de préciser que cette carte contient une réserve quant aux frontières qui y sont indiquées. Cependant, elle demeure importante car elle fait apparaître l'interprétation que donnait le Gouvernement malaisien en 1964 quant à l'objet de la convention de 1891, c'est-à-dire que le tracé de la ligne délimitait les possessions respectives des Parties sur terre et en mer.

38. La carte qui s'affiche maintenant à l'écran et qui se trouve sous la cote n° 58 des dossiers de plaidoirie, est intitulée «*Tawau*» et a également été dressée par le ministère de la défense britannique pour la direction nationale des cartes de Malaisie (mémoire de l'Indonésie, atlas, carte 13). La date en est 1965. Encore une fois, nous retrouvons la ligne établie par la convention, s'étendant le long du parallèle de latitude 4° 10' nord à l'est de l'île de Sebatik et dans la baie de Sainte-Lucie. Quoique cette carte contienne une note avertissant qu'elle ne doit pas être considérée comme faisant autorité pour ce qui concerne les frontières internationales, il est tout de même significatif qu'il apparaisse, en bas de la carte, un croquis représentant un «diagramme de frontières», en anglais *boundary diagram*, qui reproduit le tracé de la ligne de 1891.

39. Voici un autre exemple. Cette fois-ci, il s'agit d'une carte de l'année suivante, 1966, également publiée par la direction nationale des cartes de Malaisie. Elle s'intitule «*Malaysia, Singapura, Brunei; Pemerentahan*» (en français : Carte politique de la Malaisie, Singapour et Brunéi) et elle se trouve sous la cote n° 59 de vos dossiers (contre-mémoire de l'Indonésie, carte A.1). Aucune réserve ne figure sur cette carte. Le tracé frontalier est encore une fois toujours le même : la ligne est prolongée à l'est de Sebatik et continue jusqu'à rejoindre, au large de la mer de Célèbes, la ligne de la convention de 1930 entre la Grande-Bretagne et les Etats-Unis.

40. Je voudrais maintenant passer à une carte qui revêt une importance capitale pour la présente affaire. Il s'agit d'une carte officielle dressée par le ministère du territoire et des mines de la Malaisie et publiée en 1968 — soit un an avant la date à laquelle le litige entre les Parties s'est cristallisé (mémoire de l'Indonésie, atlas, carte 16). Cette carte porte le n° 60 dans vos dossiers. Elle avait été préparée par un organisme gouvernemental malaisien dans le cadre d'une étude géologique de la région de Bornéo du Nord conduite en 1967. A l'époque, la Malaisie commençait à manifester un intérêt vif pour la prospection du pétrole et du gaz dans la région, ce qui avait amené le Gouvernement malaisien à porter une attention toute particulière à la zone limitrophe des îles de Sipadan et Ligitan.

41. La carte, qui ne contient pas de réserve, représente les frontières de Sabah par une ligne pointillée, soulignée par une ligne continue rouge surimposée. La ligne établie par la convention de 1891 est représentée comme s'étendant à l'est de Sebatik. Elle rejoint la prolongation en direction du sud de la ligne de la convention de 1930 entre la Grande-Bretagne et les Etats-Unis.

Comme vous pourrez vérifier sur l'agrandissement qui figure à l'écran, il n'y a pas d'erreur : la légende de la carte indique comme frontière internationale la ligne en pointillé qui reproduit le tracé habituel de la convention de 1891.

42. Le professeur Pellet parlera tout à l'heure plus en détail de cette carte ainsi que de l'histoire des concessions pétrolières dans la région. Pour ma part, je ne m'y attarderai pas. D'ailleurs, cette carte, qui représente les concessions pétrolières de 1968, n'est qu'un exemple parmi d'autres. En effet, nombreuses sont les cartes officielles malaisiennes qui reproduisent le tracé caractéristique de la ligne de 1891. Ces cartes témoignent de l'existence d'un accord des Parties sur le sens et la portée de la convention de 1891.

43. En voici encore un autre exemple.

44. L'agent de l'Indonésie a rappelé que, en 1969, lors de la délimitation du plateau continental dans le détroit de Malacca et la mer de Chine méridionale, la Malaisie a émis pour la première fois des prétentions sur les îles de Sipadan et de Ligitan. La carte, qui apparaît maintenant à l'écran (mémoire de l'Indonésie, atlas, carte 17) — et qui figure dans vos dossiers sous la cote n° 61, avait été annexée à l'accord auquel ces négociations avaient abouti. Sur cette carte apparaît une ligne pointillée s'étendant à l'est de Sebatik. La partie malaisienne n'a évidemment pas pu ignorer l'existence de cette ligne à l'époque.

45. Mais la liste des cartes officielles malaisiennes sur lesquelles figure la ligne établie par la convention ne s'arrête pas en si bon chemin. Au contraire, la production de ces cartes se poursuit, même après la date critique.

46. Regardons donc une carte qui porte le n° 64 dans les dossiers de plaidoirie. Cette carte, dressée par le *Department of Lands and Surveys* de la région de Sabah en 1964, a été publiée par la direction nationale des cartes de Malaisie en 1972. Elle est intitulée *«Malaisie Timor Sabah»* (mémoire de l'Indonésie, atlas, carte 18). La ligne qui représente le tracé de la ligne de 1891 coïncide avec la frontière représentée sur la carte précédente. Ainsi, comme la Cour peut le remarquer, le point de vue de la Malaisie n'avait toujours pas changé en 1972. L'emplacement de la frontière était le même dans les éditions de 1966 et 1967 (mémoire de l'Indonésie, atlas, cartes 12 et 14) de la même carte publiées par le même service cartographique malaisien (qui figurent sous les cotes n° 62 et 63 dans vos dossiers).

47. Il faut souligner que la carte de 1972 a d'autant plus d'importance qu'elle a été publiée par l'Organe gouvernemental malaisien responsable pour la production cartographique trois ans après les négociations de 1969 et après la première formulation par la Malaisie de ses revendications sur les îles litigieuses.

48. En 1974, le département des statistiques malaisien publiait une carte intitulée «Negeri Sabah, Recensement de la population et des logements, carte montrant la distribution de la population» (mémoire de l'Indonésie, atlas, carte 20; dossiers de plaidoirie, n° 65). Cette carte est assortie d'une réserve quant aux frontières mais elle contient de nouveau une ligne qui dépasse l'île de Sebatik, conformément à la convention de 1891.

49. Monsieur le président, Madame et Messieurs de la Cour, le professeur Pellet expliquera tout à l'heure comment l'ensemble du comportement de la Malaisie révèle la coïncidence entre son point de vue et celui de l'Indonésie à propos du traité de 1891. Pour ma part, je me permets de souligner que cette production cartographique mérite l'attention particulière de la Cour, car elle constitue un élément de preuve de la pratique ultérieure de la Malaisie à l'égard de la convention de 1891.

50. Dans l'affaire de l'*Île Kasikili/Sedudu (Botswana/Namibie)*, la Cour a fait référence à la pratique ultérieure des Etats. Elle a notamment évoqué le commentaire de la Commission du droit international sur le projet d'article 31, paragraphe 3 *b)* de la convention de Vienne sur le droit des traités. La Commission observait à ce sujet :

> «L'importance, en tant qu'élément d'interprétation, de cette pratique ultérieurement suivie dans l'application du traité est manifeste car elle constitue une preuve objective de l'accord des parties sur le sens du traité. Le recours à cette pratique en tant que moyen d'interprétation est solidement établi dans la jurisprudence des tribunaux internationaux.» (*Annuaire de la Commission du droit international 1966*, vol. II, p. 241, par. 15.)

51. En l'espèce, le fait que, sur un très grand nombre de cartes officielles malaisiennes, apparaisse une ligne traversant l'île de Sebatik et continuant au-delà doit bien avoir une raison d'être. Cette ligne ne peut pas y être reproduite par hasard, carte officielle après carte officielle. Elle ne peut être que l'illustration de l'accord de la Malaisie sur la ligne résultant de la convention de 1891. En tout état de cause, la production cartographique malaisienne postérieure à

l'indépendance apporte des indications précieuses quant à la définition de la frontière entre les deux Etats telle que la conçoit la Malaisie.

Une dernière catégorie de cartes doivent faire l'objet d'un examen attentif, ce sont :

IV. Les cartes soumises à la Cour par la Malaisie

52. Je ne peux pas examiner une à une toutes les cartes produites par la partie malaisienne dans son volumineux «*Memorial Atlas*» et son contre-mémoire. Je me limiterai à quelques exemples et à quelques observations générales concernant l'ensemble de cette cartographie.

53. Certaines cartes produites par la Malaisie sont de provenance néerlandaise et britannique et datent du début du siècle dernier, notamment les cartes nautiques et les cartes dressées par le bureau topographique des Indes néerlandaises. Elles ne montrent que les frontières sur l'île de Bornéo même. Comme il a déjà été noté dans nos écritures (contre-mémoire, vol. I, annexe relative aux cartes, par. A.4 et A.5 et réplique, vol. 1, annexe relative aux cartes, par. 4 et 5), ces cartes ont pour but de fournir des renseignements techniques et elles ne peuvent pas être des sources fiables quant aux indications que l'on pourrait en déduire en matière d'appartenance territoriale. Aucune attribution de souveraineté n'y est indiquée et de plus, nous n'avons aucun moyen de savoir dans quelles circonstances elles ont été dressées. Elles ne sont donc pas d'une grande utilité pour trancher la question qui est posée à la Cour.

54. D'ailleurs, la plupart des cartes produites par la Partie malaisienne ne peuvent servir à appuyer sa revendication territoriale sur les îles qui font l'objet du présent différend. En effet, elles ne prouvent aucunement que les îles de Sipadan et Ligitan étaient soumises à la souveraineté de la devancière de la Malaisie, la Grande-Bretagne. Sur ces cartes figure tout au plus une ligne qui s'arrête à la côte orientale de l'île de Sebatik. Pourtant, cela ne semble pas gêner nos collègues de l'autre côté de la barre. Dans certains cas, la seule indication des îles litigieuses sur une carte suffit à la Malaisie pour les qualifier de britanniques ou de malaisiennes (mémoire de la Malaisie, vol. 5, cartes 13 et 18). Admettre cette position malaisienne serait un remarquable acte de foi, mais un acte de foi ne constitue pas une démonstration.

55. Regardons, par exemple, une carte de source britannique publiée en 1941 et intitulée «L'Etat de Bornéo du Nord» (mémoire de la Malaisie, atlas, carte 14). La carte paraît maintenant

sur l'écran et porte le n° 67 dans les dossiers de plaidoirie. D'après la Malaisie, cette carte serait intéressante car elle démontrerait «*a clear understanding that Sipadan was part of the State of North Borneo ... and a deliberate intention to include it, since the island appears just beyond the bottom line of the framework of the map*» (mémoire de la Malaisie, p. 110, par. 10.11).

56. Encore une fois, rien ne permet de dire avec l'assurance affichée par nos contradicteurs que les îles litigieuses sont ici considérées comme faisant partie de l'Etat de Bornéo du Nord. Si elles apparaissent, de justesse, d'un côté et de l'autre du cadre de la carte, une part de la partie méridionale de l'île de Sebatik ainsi que le territoire adjacent de l'île de Bornéo y sont également inclus. La Partie malaisienne ne prétend tout de même pas suggérer que ces territoires — à l'époque indiscutablement néerlandais — relevaient de la souveraineté de l'Etat de Bornéo du Nord ?

57. Il faut noter aussi que cette carte contredit les arguments basés par la Malaisie sur une présomption de titres successifs ou «*chain of title*» passant par l'Espagne et les Etats-Unis. En effet, les îles y sont clairement situées au sud d'une ligne de frontière qualifiée de «*Boundary between the Philippine Archipelago and the State of North Borneo*», c'est-à-dire de frontière entre l'archipel des Philippines et l'Etat de Bornéo du Nord.

58. Le même raisonnement s'applique à la carte suivante, qui est également une représentation de la colonie de Bornéo du Nord, publiée par le *Survey Department* de Jesselton onze ans plus tard, en 1952 (mémoire de la Malaisie, atlas, carte 17). Cette carte porte le n° 68 dans les dossiers de plaidoirie. De nouveau, la ligne délimitant les possessions de Bornéo du Nord et l'archipel des Philippines se trouve bien au nord des îles de Sipadan et Ligitan.

59. Quant aux autres éléments cartographiques introduits dans cette procédure par la Partie adverse, la Malaisie admet elle-même que les cartes se contredisent entre elles. D'un côté, il y a les cartes dans lesquelles la ligne s'arrête à Sebatik, et c'est le cas de l'exemple qui paraît à l'écran et qui est aussi dans vos dossiers sous la cote n° 69. Cette carte, intitulée «*Tawau*», a été publiée en 1964 par la direction nationale des cartes de Malaisie (mémoire de la Malaisie, atlas, carte 15). Comme vous pouvez le voir, Madame et Messieurs de la Cour, la ligne représentée sur la carte de Tawau s'arrête à la côte est de l'île de Sebatik. Pour la Partie malaisienne, ceci est très significatif. Pour l'Indonésie, le fait que certaines cartes ne font pas apparaître de continuation au-delà de l'île

de Sebatik ne signifie pas grand chose. Ce qui est significatif, ce n'est pas l'absence de cette ligne; c'est sa présence.

60. D'un autre côté, il y a également des cartes introduites en l'espèce par la Malaisie qui affichent toujours la ligne caractéristique du traité de 1891. Ainsi, par exemple, deux cartes indonésiennes de 1965 et 1968, intitulées toutes les deux «*Kalimantan Utara*», (contre-mémoire de la Malaisie, vol. 2, cartes 8 et 9) qui se trouvent sous la cote n° 70 de vos dossiers et dont deux agrandissements montrant la ligne de 1891 vont apparaître sur l'écran en succession. Et maintenant à l'écran une carte de source britannique publiée en 1978 sous le titre «*Operational Navigation Chart L-11*» (mémoire de la Malaisie, atlas, carte 22). Cette carte figure dans vos dossiers sous le n° 71. Et encore, une carte de l'île de Sebatik de 1987 qui est à l'écran et qui porte le n° 72 dans vos dossiers (contre-mémoire de la Malaisie, vol. 2, carte 11). Enfin, une carte de Kalimantan publiée par PT Pembina en 1992 (contre-mémoire de la Malaisie, vol. 2, carte 12) dont un agrandissement est à l'écran et se trouve sous le n° 73 dans vos dossiers. Toutes ces cartes ont un point commun : la ligne de frontière entre l'Indonésie et la Malaisie s'étend vers l'est au-delà de l'île de Sebatik.

61. Pour la Partie malaisienne cette ligne ne signifie rien. Qu'importe qu'elle apparaisse dans un grand nombre de cartes ? Dans d'autres cartes elle n'apparaît pas. D'ailleurs, nous explique-t-on, les preuves cartographiques sont souvent contradictoires et en général peu décisives dans les différends territoriaux, à moins qu'elles ne forment partie d'un traité international (contre-mémoire de la Malaisie, p. 117, par. 5.32). Soit, mais d'où provient la prolongation de la ligne de frontière qui apparaît en l'espèce sur la très grande majorité des cartes de la région ? Pourquoi est-elle là ? A quoi sert-elle ?

62. Confrontée à cette cartographie, la Malaisie a été bien incapable de fournir d'explication crédible. C'est pourquoi il lui faut avoir recours à des cartes qui ne montrent pas de prolongation de la ligne au-delà de Sebatik, afin de les opposer à la multitude de cartes où le tracé traverse l'île de Sebatik et se prolonge au-delà de cette dernière. C'est cette ligne que la Malaisie ne veut pas expliquer et dont elle essaye de diminuer l'importance comme elle peut.

63. En vérité, la seule explication possible, Monsieur le président, est que la ligne qui suit le parallèle 4° 10' de latitude nord au large de l'île de Sebatik reproduit celle qui figure dans la carte

annexée au «Mémorandum explicatif» néerlandais et que, par conséquent, elle représente la frontière tracée par la convention de 1891, c'est à dire une ligne de partage des territoires, îles comprises, entre l'Indonésie et la Malaisie. Cette explication — bien entendu — ne convient guère à nos éminents contradicteurs, car, de toute évidence, elle confirme la souveraineté indonésienne sur les îles revendiquées par la Malaisie.

64. Monsieur le président, Madame et Messieurs de la Cour, je suis arrivée au terme de ma plaidoirie. Je vous remercie pour votre patience et votre bienveillante attention et je vous prie de donner la parole à mon collègue et ami, le professeur Pellet.

LE PRESIDENT : Je vous remercie Maître, je donne maintenant la parole à Monsieur le professeur Alain Pellet.

LA CONFIRMATION DU TITRE INDONÉSIEN PAR LA CONDUITE DES PARTIES

M. PELLET : Monsieur le président, Madame et Messieurs les juges,

1. J'ai montré tout à l'heure que les effectivités dont se prévaut la Malaisie n'étaient pas de nature à établir un titre territorial quelconque de celle-ci sur Pulau Ligitan et Pulau Sipadan; il apparaît en particulier, que la collecte des œufs de tortues sur Sipadan, notamment par les Bajau Laut de Dinawan, n'avait aucune incidence particulière en ce qui concerne le rattachement de l'île à l'une ou l'autre des Parties. De son côté, le professeur Soons a établi, hier après-midi que, durant la période coloniale, les Pays-Bas avaient manifesté, sans ambiguïté, leur conviction de l'appartenance des deux îles à la partie néerlandaise de Bornéo. Comme Mme Loretta Malintoppi vient de le montrer, la cartographie confirme l'existence du titre indonésien fondé sur la convention de 1891. L'examen de la conduite des Parties conduit aux mêmes constatations : sous réserve de l'«invasion touristique» de Sipadan organisée par la Malaisie à partir de la fin des années 1980, le comportement des deux Etats confirme qu'ils ont tenu, et tiennent, le parallèle 4° 10' nord pour la limite de leurs possessions respectives.

2. Ceci résulte notamment des concessions pétrolières qu'ils ont octroyées, des aides à la navigation et des patrouilles navales dans la région. Avant d'en venir à ces trois points, je montrerai cependant que deux éléments dont la Malaisie fait grand cas sont dénués de pertinence

(I) et, en tout cas, ne sont pas de nature à infirmer les conclusions auxquelles conduit l'étude de la conduite mutuelle des Parties (II).

I. Les comportements invoqués par la Malaisie sont dénués de pertinence

3. La Malaisie invoque deux arguments qui, selon elle, seraient de nature à établir sa volonté d'agir à titre de souverain sur Sipadan ou, à l'inverse, la reconnaissance par l'Indonésie de son absence de titre. Il s'agit d'une part du contrôle de l'activité touristique sur Pulau Sipadan *a)* et, d'autre part, du fait que l'Indonésie n'aurait pas pris les îles contestées en considération lorsqu'elle a procédé, en 1960, au tracé de la limite de ses eaux archipélagiques *b)*. Quoiqu'avérés, ces deux faits n'ont certainement pas la signification juridique que la Malaisie leur prête.

a) *L'invasion touristique de Sipadan par la Malaisie*

4. Dans sa réplique, la Malaisie se prévaut de la «réglementation du tourisme» *(regulation of tourism)*, qui établirait son administration des deux îles (cf. p. 22, par. 2.31). Elle n'en donne pour preuve que l'adoption, en 1997, d'une ordonnance, qui ne semble pas avoir été publiée, déclarant les deux îles zones protégées (*Protected Areas Order* — mémoire de la Malaisie, vol. 4, annexe 123). En tant que tel, l'instrument n'est guère convaincant : il s'agit d'une réglementation qui n'a pas davantage de valeur probante que la proclamation, par les autorités coloniales d'un «*Bird Sanctuary*»; j'en ai parlé tout à l'heure. Toutefois, en la présente occurrence, il faut bien reconnaître que cette proclamation correspond à une réalité sur le terrain ce qui n'était pas le cas pour la réserve d'échassiers. Je l'ai dit, depuis la fin des années 1980, la Malaisie a procédé, méthodiquement, à une véritable invasion touristique de l'île de Sipadan.

5. Au point de vue juridique, l'important est que celle-ci n'a commencé qu'à la fin des années 1980, c'est-à-dire, comme l'Indonésie l'a expliqué dans son mémoire, bien après la date critique (mémoire de l'Indonésie, p. 152-160, par. 8.5-8.28 et p. 171-182, par. 8.70-8.97). Selon la définition qu'en donne le récent *Dictionnaire de droit international public* publié sous la direction du professeur Jean Salmon, la date critique est la

> «date ou période pertinente pour établir le contenu d'une situation juridique et à laquelle il faut se placer pour apprécier les droits (habituellement des titres territoriaux) respectifs des parties et à partir de laquelle les actions unilatérales des

> parties ne sont plus susceptibles de modifier leurs droits respectifs» (Bruylant/AUF, Bruxelles, 2001, p. 293).

6. En l'espèce, les deux Parties s'accordent pour considérer que cette date doit être fixée au 18 septembre 1969, jour où elles ont constaté l'existence du différend relatif à la souveraineté sur les deux îles (cf. contre-mémoire de l'Indonésie, p. 9, par. 2.18). Tout ce qu'elles ont pu faire depuis lors n'a pu modifier la situation juridique existante. Aux effets «naturels» qui s'attachent, d'une manière générale, à la date critique s'ajoutent ici deux éléments :

— d'une part, les deux Etats se sont entendus pour ne pas porter atteinte au *statu quo* en attendant le règlement du différend; et,

— d'autre part, l'Indonésie a constamment protesté contre la violation de ses droits.

7. L'agent de l'Indonésie a rappelé hier les circonstances dans lesquelles l'accord de *statu quo* a été conclu (CR 2002/27, p. 16-18, par. 15-20; voir aussi mémoire de l'Indonésie, p. 156-158, par. 8.18-8.20); la Malaisie n'a pas contesté ce point lors des plaidoiries écrites. Il s'en déduit qu'en modifiant la consistance même de Sipadan, en faisant de cette île inhabitée une usine à touristes — la Partie malaisienne se targue de ce que plus de cent quinze mille touristes l'ont visitée au cours des quinze dernières années (mémoire de la Malaisie, p. 18, par. 3.19) —, en y construisant de multiples installations touristiques, la Malaisie a violé l'accord des deux parties tendant à laisser les choses en l'état jusqu'à l'intervention d'un règlement définitif du litige, accord que, pour sa part, l'Indonésie a scrupuleusement respecté.

8. En revanche, soucieuse de ne pas laisser la Malaisie empiéter sur ses droits, l'Indonésie a pris soin de protester contre les différentes phases de cette intrusion malaisienne massive. Celle-ci n'a été manifeste qu'à partir de 1988. Le 7 mai de cette année-là, le ministère des affaires étrangères indonésien a dénoncé, dans une note verbale que j'ai déjà citée partiellement lors de ma première intervention de ce matin, la plantation d'une centaine de cocotiers, la construction d'un débarcadère et le début d'activités touristiques organisées :

> *«Such activities are clearly contrary to the understanding reached during the negotiation on the delimitation of the continental shelf boundaries between Indonesia and Malaysia, held in Kuala Lumpur in 1969. It was then clearly understood by the Malaysian and the Indonesian delegations that, since no agreement could yet be reached on the question of ownership or title of the islands of Sipadan and Ligitan the two sides agreed to temporarily set aside the question and to maintain the status quo on the islands (no activities except for maintaining a lighthouse at the easternmost part of Sipadan) until a mutually acceptable solution could be reached and to*

> *postpone the negotiation on the delimitation in the area.»* (Mémoire de l'Indonésie, vol. 4, annexe 142.)

De nouvelles protestations de ce type furent émises le 15 avril 1992 suite à la construction d'une quarantaine de bungalows et de divers équipements hôteliers (mémoire de l'Indonésie, vol. 4, annexe 147), le 2 avril 1993 (*ibid.*, annexe 158), le 17 juin 1993 (*ibid.*, annexe 164), le 6 septembre 1994 (*ibid.*, annexe 176) et le 17 avril 1995 (*ibid.*, annexe 180); ou encore le 23 novembre 1993 au sujet d'une brochure diffusée par le ministère malaisien de la culture, des arts et du tourisme, présentant Sipadan comme *«one of the scuba diving resorts in Malaysia»* (*ibid.*, annexes 170 et 178).

9. La Malaisie ne trouve qu'une remarque à faire à ce sujet : les protestations indonésiennes concernant spécifiquement les activités touristiques malaisiennes à Sipadan n'ont commencé qu'en 1988 pour se terminer en 1994 (réplique de la Malaisie, p. 75-76, par. 5.27-5.28). Certes ! Mais pour des raisons assez évidentes, Monsieur le président : l'exploitation touristique de l'île n'a commencé qu'à la fin des années 1980; et il n'aurait pas été très sensé d'adresser à la Malaisie des protestations récurrentes à l'encontre d'une occupation qui se perpétuait — d'autant moins que les Parties ont entamé, à partir de 1992, des pourparlers à un haut niveau visant à régler définitivement le différend et que le chef de la délégation malaisienne à la seconde session du groupe de travail conjoint avait promis, en janvier 1994, que son pays s'abstiendrait dorénavant de renforcer ses activités sur Ligitan et Sipadan, réitération tardive du principe du *statu quo* (cf. mémoire de l'Indonésie, vol. 4, annexe 176).

10. Mais le fait demeure : nonobstant l'accord sur le *statu quo* de 1969, confirmé donc en 1994, la Malaisie a organisé l'exploitation touristique de Pulau Sipadan, et l'Indonésie a protesté contre cette entreprise, qui n'a, de toutes manières, débuté qu'après la date critique et ne saurait dès lors renforcer en quoi que ce soit la thèse malaisienne. Il en va de même s'agissant d'un autre argument récurrent dans les écritures de la Malaisie, qui concerne :

b) *Le tracé de la limite des eaux archipélagiques indonésiennes de 1960*

11. Celui-ci a été effectué par l'Acte n° 4 du 18 février 1960 (mémoire de l'Indonésie, vol. 4, annexe 128). La Malaisie relève à juste titre qu'il ne prend pas en compte Sipadan et Ligitan pour

établir les lignes de base archipélagiques retenues alors (cf. mémoire de la Malaisie, p. 84-85, par. 7.20-7.21); mais ce fait n'a pas les implications juridiques qu'elle voudrait en tirer.

12. Pour en apprécier la portée, il faut d'abord se reporter au contexte de l'époque : l'Indonésie militait, dans un environnement largement hostile, pour la reconnaissance du concept d'eaux archipélagiques. A la veille de la deuxième Conférence des Nations Unies sur le droit de la mer qui allait se tenir du 17 mars au 26 avril 1960, il y avait urgence à créer un précédent; et celui-ci ne devait pas constituer une rupture si radicale avec le droit de la mer alors en vigueur qu'il en eût été dissuasif. Ces deux éléments sont plus que suffisants pour expliquer pourquoi Sipadan et Ligitan ne furent pas prises en considération dans la définition des eaux archipélagiques indonésiennes :

— quoi qu'en écrive la Malaisie (réplique de la Malaisie, p. 79-81, par. 5.41), l'Acte de 1960 fut préparé dans une certaine précipitation avec, en ligne de mire, l'ouverture de la deuxième Conférence sur le droit de la mer;

— au surplus, l'Indonésie, soucieuse d'obtenir la consécration de la notion d'eaux archipélagiques, entendait, pour le reste, s'écarter le moins possible du droit de la mer existant.

13. L'un des *credo* de celui-ci, énoncé dès 1951 par la Cour internationale de Justice dans l'arrêt relatif aux *Pêcheries* norvégiennes était que «le tracé des lignes de base ne peut s'écarter de façon appréciable de la direction générale des côtes» (*C.I.J. Recueil 1951*, p. 133), principe qu'énonçait dans les mêmes termes l'article 4, paragraphe 2, de la convention de Genève sur la mer territoriale. En outre, «les étendues de mer situées en deçà de ces lignes doivent être suffisamment liées au domaine terrestre pour être soumises au régime des eaux intérieures». C'est d'ailleurs ce principe que consacre l'article 47, paragraphe 3, de la convention de Montego Bay aux termes duquel le tracé des lignes de base archipélagiques «ne doit pas s'écarter sensiblement du contour général de l'archipel».

14. Or tel eût été le cas si l'Indonésie avait pris les deux îles en considération pour fixer le tracé de ses eaux archipélagiques comme le montre le croquis projeté derrière moi, qui porte le n° 74 dans les dossiers de plaidoiries. La vaste avancée vers le large constituée par le triangle allant du point 36 au point 37 en passant par Ligitan se serait, assurément, écartée considérablement de la direction générale des côtes indonésiennes et, compte tenu des effets résultant des lignes de base

archipélagiques, aurait conduit à un empiétement considérable sur des espaces maritimes sur lesquels le Royaume-Uni aurait pu faire valoir des revendications.

15. La Malaisie reproche à l'Indonésie de n'avoir pas respecté l'article 47, paragraphe 1, de la Convention sur le droit de la mer qui autorise les Etats archipels à «tracer des lignes de base archipélagiques droites reliant les points extrêmes des îles les plus éloignées...» (cf. réplique de la Malaisie, p. 78-79, par. 5.38). Cette objection est curieuse :

— elle est anachronique car l'Acte indonésien date de 1960, la convention de Montego Bay, qui consacre la notion d'eaux archipélagiques grâce aux efforts d'une poignée d'Etats parmi lesquels l'Indonésie fut particulièrement active, de 1982;

— l'article 47 *autorise* les Etats archipélagiques à inclure les îles les plus éloignées à certaines conditions (dont il n'est pas certain qu'elles soient remplies en l'espèce) mais ne les y *oblige* point; à cet égard, le contraste avec les îles principales est frappant; le paragraphe 1 de cette disposition poursuit en effet en précisant que cette possibilité n'est ouverte que «*à condition* que le tracé de ces lignes de base englobe les îles principales...» et il faudrait beaucoup d'imagination pour qualifier Ligitan et Sipadan d'«îles principales»;

— en outre, comme je l'ai rappelé, le paragraphe 3 de ce même article impose au tracé des lignes de base de ne «pas s'écarter sensiblement du contour général de l'archipel», ce qui serait le cas si les deux îles étaient prises en compte.

16. Du reste, le cas de Ligitan et de Sipadan est loin d'être isolé : bien d'autres îles relevant de la souveraineté indonésienne (et reconnues comme telles par la Malaisie lors des négociations de 1969) sont restées en dehors des eaux archipélagiques de l'Indonésie. Tel est le cas, par exemple, de plusieurs îles ou îlots situés dans le détroit de Malacca ou la mer de Chine, mentionnés dans l'affidavit de l'un des principaux négociateurs indonésiens, l'amiral Adi Sumardiman (mémoire de la Malaisie, vol. 5, annexe B; voir aussi : mémoire de la Malaisie, p. 154, par. 8.12).

17. Du reste, la Malaisie a bien mauvaise grâce à mettre en avant un argument de ce genre : elle s'est, elle-même, abstenue de prendre en compte Ligitan et Sipadan lorsqu'elle a défini sa mer territoriale en 1969, l'année même où, pour la première fois, elle revendiquait les deux îles : trois ans plus tard, la direction nationale des cartes de Malaisie, qui avait joué un rôle décisif dans l'échec des négociations, a, à nouveau, publié la carte habituelle laissant les deux îles en dehors de

la juridiction malaisienne comme mon amie Loretta Malintoppi l'a excellemment rappelé tout à l'heure (voir la carte n° 64 des dossiers de plaidoiries).

18. Conclusion, Monsieur le président : ni l'invasion touristique de Sipadan organisée par la Malaisie à partir de la fin des années 1980, ni l'exclusion de ces deux îles excentrées des eaux archipélagiques indonésiennes ne constituent des arguments pertinents en faveur de la thèse malaisienne. L'Indonésie, au contraire, peut se prévaloir de la coïncidence très marquée des pratiques des deux pays en ce qui concerne les aides à la navigation et les concessions pétrolières, à quoi s'ajoute la régularité des patrouilles navales indonésiennes dans la région.

II. La coïncidence de la conduite des Parties le long du parallèle 4° 10' nord

a) *Les patrouilles navales indonésiennes*

19. Commençons par ces dernières.

20. La Malaisie affirme que l'Indonésie ne fait état d'aucune manifestation d'autorité effective sur les îles contestées durant la période clé allant de l'indépendance à la date critique (cf. réplique de la Malaisie, p. 82, par. 5.44). Autant ceci vaut pour la Malaisie qui ne s'est mise à faire acte de présence sur Pulau Ligitan et Pulau Sipadan ou dans leurs parages qu'à partir des années 1980, avec une certaine frénésie — mais non sans incohérence ne serait-ce qu'en matière cartographique comme Mme Malintoppi l'a montré —, autant ceci est inexact s'agissant de l'Indonésie.

21. Le professeur Soons a rappelé hier que les Néerlandais ont constamment exercé des pouvoirs de police maritime dans ces confins éloignés de leur empire colonial. Après l'indépendance, l'Indonésie a renforcé sa présence navale dans la région. Comme cela ressort d'une série cohérente de témoignages précis de marins ayant participé à ces opérations, la marine indonésienne non seulement patrouillait régulièrement dans les eaux baignant les deux îles, mais encore effectuait, chaque fois que nécessaire, des opérations de police *sur* les deux îles. Je vous rappelle que nous sommes après l'indépendance et avant la date critique. Nous en avons des preuves en ce qui concerne par exemples :

— une patrouille du navire de guerre *Kri Ular Sanca* à Sipadan et dans les eaux environnantes en 1965 (mémoire de l'Indonésie, vol. 5, annexe F);

- une autre patrouille en mai 1967 au large de Sipadan (mémoire de l'Indonésie, vol. 5, annexe G);
- les suites données en décembre 1967 à une plainte de pêcheurs de Nanookhan qui avaient dénoncé la pêche illégale d'habitants de Sampurna autour des deux îles (mémoire de l'Indonésie, vol. 5, annexe D); ou
- ou une inspection maritime à la fin de 1968 (mémoire de l'Indonésie, vol. 5, annexe H).

22. Rien, en revanche, durant toute cette période, du côté malaisien. Et pas non plus de protestation contre ces opérations de routine qui montrèrent surtout que Sipadan était inhabitée et la lanterne mal entretenue et rouillée (cf. mémoire de l'Indonésie, vol. 5, annexe D').

23. Bien entendu, l'Indonésie maintint sa présence dans la zone maritime concernée après 1969, tandis que la Malaisie s'efforçait d'y établir la sienne. Il en résulta une guerre de notes verbales sans aucune portée juridique si ce n'est qu'elles établissent ce que chaque Partie considère être ses droits — à une nuance importante près cependant : les actions indonésiennes sont la continuation de celles que je viens de décrire alors que celles de la Malaisie apparaissent clairement comme la conséquence de la soudaine découverte par ce pays de prétendus droits sur les îles litigieuses, qu'il lui a semblé opportun de tenter d'établir *ex post facto* (à partir, ici encore, seulement de la fin des années 1980), comme pour rattraper ses abstentions passées.

24. Une dernière remarque néanmoins sur ce point, Monsieur le président : malgré la montée de la tension entre les deux pays, l'Indonésie s'est, pour sa part, toujours montrée très soucieuse de ne pas empiéter sur la ligne du parallèle 4° 10' nord et de ne pas envenimer la situation. Ceci résulte, par exemple, des instructions données en 1990 par le chef d'état-major des armées au commandant de la flotte orientale qui ordonnait un renforcement de la présence navale indonésienne dans la zone revendiquée par la Malaisie mais lui enjoignait «*to avoid actions of a hostile character or that may worsen the situation*» (mémoire de l'Indonésie, vol. 4, annexe 144. Cette préoccupation est rappelée dans une note officielle du 17 janvier 1992 qui précise que la limite des patrouilles est fixée à la latitude 4° 10' nord (*ibid.*, annexe 145).

b) *Les aides à la sécurité de la navigation*

25. Indépendamment de la question des phares dont j'ai parlé plus tôt ce matin, et dont je rappelle qu'ils sont entretenus par la Malaisie avec l'accord de l'Indonésie, les activités des Parties en matière d'aide à la sécurité de la navigation témoignent également de leur accord pour respecter la ligne du parallèle 4° 10' nord.

26. Bien que l'Indonésie y soit revenue à plusieurs reprises dans ses écritures, il est intéressant de constater que la Malaisie garde un silence obstiné et embarrassé sur cet aspect du dossier. Rien, pas une ligne, dans les écritures malaisiennes à cet égard. Le comportement mutuel des Parties est pourtant révélateur; mais, puisque nos contradicteurs ne nous opposent aucun argument, je me limiterai à résumer ce que nous avons écrit à ce sujet et me permets, Madame et Messieurs les juges, de vous y renvoyer (cf. mémoire de l'Indonésie, p. 163-164, par. 8.41-8.45; contre-mémoire de l'Indonésie, p. 140, par. 7.58 et réplique de l'Indonésie, p. 64-65, par. 3.19-3.24).

27. En fait, plusieurs éléments sont pertinents :

— les eaux situées de part et d'autre du parallèle 4° 10' au large des côtes de Kalimantan et de Sabah sont dangereuses pour la navigation du fait de l'existence de nombreux récifs et hauts-fonds; en particulier, l'étroit passage entre «Alert Patches» ou «Alert Reef» — un nom significatif —, situé juste au sud du parallèle, et Roach Reefs, qui se trouvent juste au nord, est emprunté par la navigation locale de cabotage — principalement malaisienne —, et constitue une passe difficile; la carte que vous voyez à l'écran et qui figure sous le n° 75 dans les dossiers de plaidoiries, illustre cette situation;

— du 10 février au 12 mars 1994, un navire de guerre indonésien effectua des relevés d'Alert Reef et, rejoint par un autre navire de la marine militaire indonésienne, il y mouilla une balise (voir mémoire de l'Indonésie, vol. 4, annexe 181);

— cette opération se fit au su et en présence de pas moins de trois vaisseaux de guerre malaisiens (*ibid.*) qui ne réagirent aucunement, pas davantage que l'opération n'appela de réaction officielle malgré la guerre des notes verbales qui faisait rage alors;

— cette balise électrique a été constamment et ouvertement entretenue et alimentée par la marine indonésienne (cf. mémoire de l'Indonésie, vol. 4, annexe 179) sans que ceci suscite davantage de protestation; et, surtout,

— de son côté, la Malaisie a, la même année, procédé de la même manière sur Roach Reefs.

28. Comme le constata l'amiral Nicolas Ello, responsable de l'opération du côté indonésien, on ne peut qu'en déduire que la Malaisie n'a pas de doute sur la nature du parallèle 4° 10' : *«It could be assumed that Malaysia respects the 04° 10' 00 line»* (mémoire de l'Indonésie, vol. 4, annexe 181). Les concessions pétrolières accordées par les deux Parties conduisent à la même constatation.

c) *Les concessions pétrolières*

29. Sur ce point, la Partie malaisienne se montre un peu plus prolixe mais, à vrai dire, tout aussi embarrassée. C'est que, ici encore, la coïncidence entre les comportements des Parties est hautement révélatrice de leur conviction, antérieure à la date critique, selon laquelle le parallèle 4° 10' nord marque la limite de leurs juridictions respectives.

30. Comme l'Indonésie l'a exposé dans son mémoire (p. 106-109, par. 6.17-6.29), les deux pays ont, durant les années 1960, accordé des concessions pétrolières, en partie *off shore*, dont le point commun est de suivre à peu près exactement le parallèle 4° 10' :

— En ce qui concerne l'Indonésie, il s'agit de la concession «Permina/Japex» du 6 octobre 1966 (cf. mémoire de l'Indonésie, vol. 4, annexe 129 ou mémoire de la Malaisie, vol. 4, annexe 114) dont la limite septentrionale suivait le parallèle 4° 9' 30'' nord — mais il n'y a pas lieu de s'attarder sur ce petit décalage (de moins de 1 kilomètre), qui correspond à une pratique habituelle dans l'industrie d'extraction des hydrocarbures, afin d'éviter tout empiètement sur les champs d'un pays voisin (voir d'autres exemples dans le contre-mémoire de l'Indonésie, p. 139, note 73); la ligne pertinente apparaît en vert sur la carte n° 75 des dossiers des juges.

— Pour ce qui est de la Malaisie, le trait rouge représente la limite méridionale de la concession accordée en 1968 à la compagnie Teiseki (cf. mémoire de l'Indonésie, vol. 4, annexe 131). Elle aussi coïncide avec le parallèle 4° 10' nord — à 30" près, et pour les mêmes raisons. La rencontre et la complémentarité des conduites des deux Parties sont tout à fait frappantes.

31. La carte qui est maintenant projetée à l'écran, qui porte le n° 60 dans le dossier de plaidoirie, et que Mme Malintoppi nous a également montrée tout à l'heure, est extrêmement révélatrice des convictions de la Malaisie quant aux limites de sa juridiction maritime. Elle émane du ministère malaisien du territoire et des mines et a été publiée en annexe au rapport annuel sur les recherches géologiques dans la région de Bornéo (cf. mémoire de l'Indonésie, vol. 4, annexe 130). Le chiffre 14 correspond à la partie *off shore* de la concession Teiseki et la ligne rouge à ses limites extérieures. Compte tenu de la très petite échelle de la carte, elle coïncide avec la «frontière internationale» *(international boundary)* qui, comme cela est expressément indiqué par la légende sans aucune clause de non-responsabilité, est figurée par un trait en pointillé. A l'est, celle-ci rejoint à la hauteur du parallèle 4° 23' nord la ligne de l'accord avec la Grande-Bretagne et les Etats-Unis qu'elle suit très exactement; au sud, elle suit la ligne de 1891, c'est-à-dire le parallèle 4° 10' nord, au sud duquel se trouvent Ligitan et Sipadan.

32. Pour tenter de limiter la portée de ces concessions pétrolières, d'autant plus significatives qu'elles ont été accordées juste avant la date critique alors même qu'elles coïncident très exactement, la Malaisie fait valoir quelques arguments qui manquent singulièrement de force :

— En premier lieu, les concessions auraient été accordées «dans l'exercice des droits des parties» telles qu'elles les «percevaient» et non en relation avec le différend sur les deux îles (contre-mémoire de la Malaisie, p. 89, par. 4.38) — mais c'est justement en cela qu'elles ont une forte valeur probante : elles témoignent de la perception que les deux Parties se faisaient de l'extension de leur juridiction maritime (sur la base de la ligne de 1891) avant que la Malaisie forge de toutes pièces une revendication artificielle sur les deux îles. Il n'est pas indifférent à cet égard de relever que la concession Teiseki a été signée par le ministre des ressources naturelles de l'Etat de Sabah lui-même (mémoire de l'Indonésie, vol. 4, annexe 131).

— En deuxième lieu, la Malaisie affirme qu'il s'agit de «*paper claims*» (je n'ai pas réussi à trouver de traduction en français) sans signification juridique dès lors qu'elles n'ont pas été suivies de faits et d'effets (contre-mémoire de la Malaisie, p. 89-90, par. 4.39). J'avoue ignorer ce qu'il en a été côté malaisien; mais, en ce qui concerne la concession indonésienne à Pertamina et Japex (ensuite partagée avec d'autres compagnies), c'est précisément parce que les recherches effectuées aux alentours du parallèle 4° 10' n'ont rien donné que les concessions ultérieures ont porté sur les zones situées plus au sud (cf. mémoire de l'Indonésie, p. 105, par. 6.16); contrairement à ce que prétend la Malaisie, il y a donc eu des activités de prospection pétrolière effectives (et malchanceuses...) en tout cas du côté indonésien. Au demeurant, il est absurde de parler de *«paper claims»* en l'espèce : d'une part, il s'est agi de concessions en bonne et due forme, qui ont eu une contrepartie financière; d'autre part, et de toutes manières, pour que l'on puisse parler de *«paper claims»*, il faudrait que les prétentions des deux parties se fussent opposées; le tracé retenu pour leurs concessions respectives montre que, bien au contraire, elles coïncidaient entièrement.

— En troisième lieu et enfin, la Malaisie s'emploie à dénier toute portée à la concession Permina/Japex au prétexte qu'elle n'incluait pas expressément les deux îles (cf. mémoire de la Malaisie, p. 85, par. 7.21 et contre-mémoire de la Malaisie, p. 90-92, par. 4.40-4.42). Ceci est exact mais n'enlève rien à la valeur probante des faits : ils montrent que les deux Parties, à la veille de l'apparition du différend, considéraient la ligne du traité de 1891 comme la limite de leurs juridictions respectives. Du reste, la concession Teiseki, qui, encore une fois, s'arrête à la limite du parallèle 4° 10' nord, n'inclut pas davantage Ligitan et Sipadan — et il aurait tout de même été très extraordinaire que cette limite s'arrêtât à cette ligne si la Malaisie avait été convaincue qu'elle pouvait exercer sa juridiction plus au sud. On ne fixe pas ce genre de limites par hasard...

33. Je tiens à préciser, Monsieur le président, que cette constatation n'est nullement contradictoire avec les hésitations des Pays-Bas au sujet de la limite de leur mer territoriale au large de Sebatik au début des années 1920. Comme l'a fort bien montré le professeur Soons hier après-midi :

— les autorités néerlandaises hésitaient quant au tracé de la limite et le parallèle 4° 10' était l'une des possibilités envisagées;

— les Néerlandais ont formellement renoncé à discuter la question avec les Britanniques; et,

— surtout, la seule question qui pouvait se poser alors (durant les années 1920), concernait la mer territoriale; il ne serait venu à l'idée de personne de parler de plateau continental à cette époque.

34. Mais, au début des années 1960, le droit de la mer avait changé et la pratique des Parties a évolué avec lui. Elles pouvaient, à ce moment-là, revendiquer des droits souverains sur toute la zone maritime qui nous intéresse et la coïncidence des concessions pétrolières accordées par les deux pays montre que ceux-ci considéraient dorénavant que le parallèle 4° 10' nord était devenu *de facto* la limite de leurs juridictions maritimes respectives.

35. La pratique pétrolière des Parties dans la zone pertinente, est particulièrement lourde de signification juridique :

— elle constitue un élément essentiel de la pratique subséquente des successeurs des parties à la convention de 1891 et établit l'accord de l'Indonésie et de la Malaisie à l'égard de son interprétation comme l'envisage l'article 31, paragraphe 3 *b)*, de la convention de Vienne sur le droit des traités (cf. *Île de Kasikili/Sedudu, C.I.J. Recueil 1999*, p. 1075-1076, par. 49-50 et les nombreuses références citées); et

— elle témoigne de leur position quant à l'étendue de leurs juridictions respectives à la veille de la date critique.

36. Ceci, Monsieur le président, conclut les plaidoiries de l'Indonésie pour le premier tour. Toutefois, je me propose, si vous le voulez bien, de récapituler à très gros traits la position de la Partie indonésienne. Elle est simple et peut, à vrai dire, tenir en peu de mots — ce qui nous paraît contraster singulièrement avec la thèse de la Malaisie :

1) la convention du 20 juin 1891 a réglé définitivement et complètement le différend entre la Grande-Bretagne et les Pays-Bas au sujet des limites de leurs possessions respectives au nord de Bornéo;

2) le choix du parallèle 4° 10' nord a constitué une solution de compromis qui vide quelque peu de leur intérêt les contestations antérieures relatives à la limite exacte des possessions respectives dans la région des sultans de Boeloengan et de Sulu, même si le titre du premier (Boeloengan) paraît nettement plus solide que celui revendiqué par le second (Sulu);

3) la rédaction de l'article IV du traité de 1891 ne laisse aucun doute sur le fait que les parties entendaient mettre fin à toute incertitude, non seulement sur la partie «continentale», si je peux dire, de Bornéo, mais aussi en mer : *«From 4° 10' north latitude on the east coast the*

boundary-line shall be continued eastward along that parallel, across the Island of Sebitik» (souligné par nous);

4) ceci est confirmé par la fameuse — et en effet fort importante — *«Elucidation Map»* établie et publiée par le Gouvernement néerlandais lors des débats parlementaires relatifs à la ratification et qui n'a appelé aucune protestation de la Grande-Bretagne à laquelle cette carte avait été communiquée;

5) de même, les deux îles, qui n'avaient certainement pas été cédées par le sultan de Sulu à la Grande-Bretagne (et ne pouvaient l'être pour de multiples raisons), ne sont pas concernées par la convention de 1930 entre celle-ci et les Etats-Unis, qui porte sur une zone située nettement plus au nord;

6) les prédécesseurs des Parties n'ont pas manifesté un grand intérêt concret pour les deux îles durant la période coloniale; toutefois, alors que la Malaisie ne peut se prévaloir que de réglementations dont rien n'établit qu'elles aient été concrètement mises en œuvre *(paper claims)*, les Pays-Bas ont fait constamment acte de présence effective dans les parages;

7) il en est allé de même de l'Indonésie après son indépendance et jusqu'à la date critique; et plusieurs faits importants, à commencer par les concessions pétrolières qu'elles ont accordées durant les années 1960, témoignent de l'accord des Parties quant à la fixation au parallèle 4° 10' nord de la limite de leurs possessions respectives;

8) et enfin, le matériau cartographique pertinent (qui inclut des cartes officielles britanniques et malaisiennes) parle exclusivement en faveur de la thèse indonésienne.

Monsieur le président, Madame et Messieurs les juges, au nom de toute notre équipe, je vous remercie très vivement de votre attention.

Le PRESIDENT: Je vous remercie, Monsieur le professeur. Ceci met un terme à la séance de ce matin et au premier tour de plaidoiries de la République d'Indonésie. La prochaine séance de la Cour dans la présente affaire aura lieu jeudi 6 juin à 15 heures et la Malaisie entamera alors son premier tour de plaidoiries.

La séance est levée à 13 heures.

CR 2002/30

International Court of Justice	**Cour internationale de Justice**
THE HAGUE	**LA HAYE**

YEAR 2002

Public sitting

held on Thursday 6 June 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le jeudi 6 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Avant de donner la parole à l'agent de la République de Malaisie et à ses conseils, je voudrais très brièvement rendre hommage à deux des Membres de la Cour qui sont récemment décédés.

Le juge Hermann Mosler, qui nous a quittés en décembre 2001, était né en 1912 près de Bonn. Docteur en droit en 1937, il avait alors pris des fonctions de recherche à l'Institut pour le droit international de l'empereur Guillaume. Après la guerre, M. Mosler était devenu professeur à l'Université de Francfort et, en 1951, le chef du département juridique du ministère des affaires étrangères de la République fédérale d'Allemagne. Puis, en 1954, membre de la Cour permanente d'arbitrage. A la même époque, il fut nommé professeur à l'Université de Heidelberg et directeur de l'Institut pour le droit international Max Planck, position qu'il a conservée jusqu'à son élection à la Cour en 1976. C'est sous sa direction que cet institut est devenu internationalement renommé pour les études et les recherches de droit international et qu'il l'est encore aujourd'hui. En 1959, il avait été élu juge à la Cour européenne des droits de l'homme à Strasbourg et, compte tenu de la faible activité de la Cour internationale de Justice à cette époque, il avait conservé ce poste jusqu'en 1981, époque à laquelle il était déjà juge à la Cour depuis quelques années. Il dut l'abandonner parce que la charge de travail avait augmenté et qu'il était donc dans l'obligation de se consacrer exclusivement à la Cour. Il a été membre de celle-ci de 1976 à 1985. Le juge Mosler était un homme qui était profondément imprégné de l'idée que le droit avait un rôle éthique et social dans les sociétés humaines et son cours général à l'Académie de droit international en 1974 le montre bien, puisqu'il avait choisi pour titre «La communauté internationale comme société de droit».

Le juge José Sette-Camara, quant à lui, était né à Minas Gerais en 1920, au Brésil, et avait fait ses études à l'Université McGill à Montréal en préparant un texte devenu classique sur la ratification des traités. Diplomate précoce, il était à 39 ans ambassadeur du Brésil; puis homme d'Etat, il fut le dernier gouverneur de Rio de Janeiro, alors capitale du Brésil, avant de devenir maire de Brasilia. Puis, il fut journaliste au journal *Do Bresil* entre 1968 et 1972, période difficile dans l'histoire de ce pays où il sut montrer une grande indépendance. Juge à la Cour internationale de Justice de 1979 à 1988, il en fut vice-président pendant trois années et ce fut lui aussi un

magistrat épris de l'idée que le droit a la primauté sur le pouvoir dans la construction de la société internationale. Il est décédé récemment après une longue maladie dans sa maison de Rio de Janeiro.

Cet hommage étant rendu à nos deux anciens collègues, nous allons maintenant commencer l'audience d'aujourd'hui et je vais immédiatement donner la parole à l'agent de la de la Malaisie, Son Excellence M. Tan Sri Abdul Kadir Mohamad, *Ambassador-at-Large*. Monsieur l'agent, vous avez la parole.

Mr. MOHAMAD:

1. Mr. President and distinguished Members of the Court, it is a great honour to appear before you, and to take this opportunity to explain why sovereignty over the islands of Ligitan and Sipadan belongs to Malaysia.

2. Malaysia and Indonesia are two neighbouring countries in south-east Asia, which have mutually agreed to appear before this honourable Court to settle a dispute over the sovereignty of Sipadan and Ligitan, the general location of which may be viewed on the map that is now being displayed before the Court. You may also see it in tab No. 1 of your folders. [Show graphic 1 — Malaysian and Indonesian territory including islands]

The islands of Ligitan and Sipadan form part of the State of Sabah in Malaysia

3. The islands of Ligitan and Sipadan form part of the State of Sabah in the eastern part of Malaysia, which was known, during a certain period in history, as the State of North Borneo.

4. Malaysia and Indonesia have lived in peace and harmony for over 40 years, sharing not only land but also maritime boundaries. In the seas around it, Malaysia has 561 islands: Indonesia has 17,508. The fact that we have, between us, a dispute over only two islands — that is, Ligitan and Sipadan — is a measure of the generally friendly relations that exist between Malaysia and Indonesia. [End graphic 1]

The dispute over the islands affects important interests of Malaysia

5. [Show graphic 2 — the east coast of Sabah (Malaysia) and Kalimantan (Indonesia)] Nonetheless there *is* a dispute over these two islands. Indonesia first challenged Malaysia's right to

the islands in 1969, in the context of negotiations to agree upon the respective continental shelf boundaries of the two countries off the east coast of Borneo. The dispute has prevented the Parties from reaching any agreement on those boundaries, which is itself a concern. But the importance of the two islands is not limited to their importance in terms of maritime delimitation. They have for a long time been part of the social and political system of Sabah, formerly North Borneo. The two islands of Ligitan and Sipadan cannot be considered in isolation. They form part of a group of islands, traditionally called the Ligitan Group, which are relatively close together and form an economic and social unit. The people of the surrounding islands, especially Danawan and Si Amil, have always used the two islands for fishing, turtle egg collection and other purposes. You may see these islands shown on the map now on the screen and in tab No. 2 of your folders. Sipadan itself is a major tourist resort, listed in diving manuals as one of the great diving places in the world. There are important conservation interests associated with the islands, especially Sipadan, which is a major breeding ground for green turtles. [End graphic 2]

6. Mr. President, distinguished Members of the Court, the Parties tried for four years — between 1992 and 1996 — to find an amicable bilateral settlement to this dispute. We did not succeed. Thus, the decision to bring this matter for adjudication and settlement in this Court became the best way forward for both our countries. Indeed we have come to the ICJ on friendly terms, by way of a Special Agreement. In fact, when the present hearings commenced on Monday here in The Hague, the Deputy Prime Minister of Malaysia arrived in Jakarta for a three-day official visit to Indonesia.

Malaysia's case is clear and finds strong support in the evidence

7. Mr. President, Indonesia has inferred that Malaysia's case consists of "complex and artificial arguments". Let me say immediately that the Malaysian arguments are neither complex nor artificial.

8. In the written pleadings, Malaysia has established its case through clear and cogent argument, fully supported by documentary evidence.

First, Malaysia has shown that it acquired title to the islands of Ligitan and Sipadan by grant of the previous sovereign. Sovereignty over the Ligitan Group was acquired as a result of treaties between Great Britain and the United States in 1907 and 1930. An earlier treaty, the Madrid Protocol with Spain in 1885, was essential background to these two treaties.

Second, Malaysia has shown that these two islands are, and for many years have been, in the possession and subject to the administration of Malaysia and of its predecessors in title. These predecessors in title were, from 1878, the British North Borneo Company which came under the protection of Great Britain in 1888. In 1946, the status of the State of North Borneo changed from a protectorate to a colony of Great Britain. In 1963 it became the Malaysian State of Sabah. Throughout, the two islands were administered as part of North Borneo or Sabah. That remains the case to this day.

9. Senior counsel for Malaysia, Sir Elihu Lauterpacht, will elaborate on these arguments later this afternoon when he presents the overview of Malaysia's case.

The facts concerning Malaysia's title

10. In particular, Malaysia has provided, in the written pleadings, evidence on six historical facts and their validity under the international law in force at the time of those transactions. These six facts are as follows:

(1) Like other islands off the east coast of Borneo, the Ligitan group, including Ligitan and Sipadan, were part of the dominions of the Sultanate of Sulu in the nineteenth century, something expressly recognized by the Dutch.

(2) When the people of these islands transferred their allegiance from the Sultan of Sulu to the British North Borneo Company, or BNBC, the company administered the two islands along with the rest of the Ligitan Group.

(3) The BNBC's administration of the offshore islands was not challenged by Spain or by the Netherlands.

(4) The BNBC's administration was recognized as a fact by the United States.

(5) The BNBC's right of administration was converted into a full right of British sovereignty as a result of the Treaty of 1930 between the United States and Great Britain.

(6) In 1963, Malaysia succeeded to British sovereignty over the islands, and its sovereignty continues uninterrupted to the present day.

Indonesia has failed to provide evidence to substantiate its case

11. By contrast, Indonesia has failed to provide evidence to substantiate its case. Here, three points stand out.

(1) There is no evidence that Ligitan and Sipadan were ever part of the territory of Bulungan.

(2) There is no evidence that Ligitan and Sipadan were allocated to the Netherlands in 1891. The British-Dutch Convention of 1891 was a land boundary treaty. It concerned possessions "in Borneo". It did not apportion maritime areas. Although Indonesia rests its whole case on the Convention, and thus makes the Convention relevant to this dispute, the fact remains that the Convention is irrelevant to the two islands.

(3) There is no evidence that the islands of Ligitan and Sipadan were ever administered or claimed by the Netherlands or by Indonesia, before Indonesia raised this subject as a matter of dispute between Indonesia and Malaysia in 1969.

12. Later this afternoon, Professor Nico Schrijver will give details about the extent of Dutch claims in the area prior to 1891, and Professor Crawford will show that the offshore islands were considered both by the British and the Dutch as belonging to Sulu and then to Spain.

13. Tomorrow morning, Professor Jean-Pierre Cot will spell out in more detail the many reasons why the 1891 Convention cannot and does not support Indonesia's case.

14. Apart from its actual language, let me just mention one reason. The 1891 Convention could not have given the two islands to Indonesia because at the time they did not belong to British North Borneo, any more than they belonged to Dutch Borneo. They were not included in the 1878 grant. As this Court pointed out in its intervention Judgment last year, "the grant of 1878 is not in issue as between Indonesia and Malaysia in this case, both agreeing that Pulau Ligitan and Pulau Sipadan were not included in its reach"[1]. That was the Judgment. But if the two islands were not part of North Borneo in 1891, how can there have been any intention to give them to the Netherlands? They were simply not part of the picture.

---

[1] Judgment of 23 October 2001, para. 66.

The so-called "Standstill Agreement" and the issue of oil practice

15. Mr. President, distinguished Members of the Court, I feel compelled to discuss something which seems to have taken on great significance in Indonesia's case, that is the so-called "Standstill Agreement" of 1969. Indonesia accuses Malaysia of repeated breaches of that Agreement, and through its counsel, prided itself with its own restraint and compliance with it. It also relies on the Standstill Agreement to exclude the continuous evidence of Malaysian administration of the islands since 1969.

16. [Show graphic 3 — Memorial of Malaysia, Ann. 74.] The Court will have noted that although the Standstill Agreement was referred to repeatedly by the Agent for Indonesia and by several of its counsel, not one of them took care to quote its actual language. You can see it on the screen now, and it is tab No. 3 in your folders. Let me quote it in full:

> "With reference to our negotiation and the Agreement concerning the delimitation of the continental shelf boundaries between our two countries, initialled today by us on behalf of our respective Governments, I have the honour to state our understanding that both the negotiation and the Agreement are purely and wholly of a technical nature."[2]

17. Now this exchange of letters is completely general and vague in its terms. It reflects an understanding "that both the negotiation and the Agreement are purely and wholly of a technical nature". It says nothing about any territorial dispute. The Agreement itself does not even cover the east coast of Borneo. The Court will be aware of standstill agreements concluded during boundary negotiations: they characteristically refer to the issue in dispute, they say that the parties will do nothing to exacerbate the dispute, they make it clear that anything either party does is without prejudice to the position of the other, they provide for confidentiality and any other agreed provisions. This particular exchange of letters does absolutely nothing of the sort. All it says is that the Agreement and the negotiation were of a technical nature. That is true: they dealt with the technical issue of maritime boundaries, and they did not address, for example various political issues which had soured relations between our two countries in the early 1960s. They make no reference to the disputed islands, they are not "without prejudice" agreement and they have no relevance to the present case.

---

[2] Memorial of Malaysia, Ann. 74.

18. Accordingly there can be no question that anything done by Malaysia since 1969 in relation to the islands was, or could have been, a breach of the exchange of letters. There is nothing in the exchange of letters by which Malaysia undertook not to develop the two islands (which are not mentioned). This is a purely unilateral and retrospective interpretation by Indonesia of the language of the exchange of letters, an interpretation which bears no relationship to its text.

[End graphic 3.]

19. May I add, however, that Malaysia is fully aware of its obligations, under the Statute of the Court and the principle of good faith, not to prejudice the case in any manner or to allow the destruction of evidence. But it would not serve the interests of the people — whatever the decision of the Court on these two islands — if we did not take the necessary conservation measures or ensure a sustainable development of tourism, which, I might add, is an entirely different thing from a tourist invasion as suggested by counsel for Indonesia.

20. It was also suggested that the standstill agreement was the reason why the Parties have not developed their oil licensing practice east of Sebatik. Again, there is no truth in this at all. Any agreement by the Parties not to develop an area or issue licences pending resolution of a dispute would be express: again, there are examples of which the Court will be aware. The reason the Parties did not issue further licences was, first of all, the dispute itself, and secondly the indications from seismic studies that the area was not prospective. In his speech tomorrow dealing with the mapping issues, Professor Crawford will discuss further the question of the Parties offshore oil practice, such as it is.

The issue before the Court

21. Mr. President, distinguished Members of the Court, as it did in the opening of its written pleadings, Malaysia today maintains that the issue before the Court remains the same: that is, (1) to confirm Malaysia's sovereignty over the two islands based upon treaties with the other interested States and on long and effective possession and administration; and (2) to reject Indonesia's claim based upon its interpretation of the 1891 Boundary Convention.

22. In this context it is important to recall that Asia is replete with territorial disputes of one kind or another. This case is only the first case in 40 years where the Court has had to decide a

territorial dispute between two Asian countries. The role this Court has performed so often in the rest of the world is thus once more extended to Asia. Malaysia trusts that the Court will follow the same approach, the same judicial policy as in previous boundary cases, that of favouring stability. Malaysia and its predecessors have administered these islands without interruption, peacefully under a claim of title. That peaceful and established possession and title should not be interrupted and subverted by a claim based upon a totally new interpretation of a treaty — an interpretation which neither State which concluded the treaty ever proposed or considered.

23. For the reasons which I have outlined and other reasons which counsel for Malaysia will develop, we are confident that Malaysia's title to Pulau Ligitan and Pulau Sipadan is unshakeable, clear and incontrovertible.

24. Mr. President, I wish to conclude here, and invite you to call upon my colleague the Co-Agent, Ambassador Noor Farida Ariffin, to present to you the geographical and social context of Ligitan and Sipadan in relation to the State of Sabah in particular, and to Malaysia in general.

Mr. President, distinguished Members of the Court, I thank you.

The PRESIDENT: Je vous remercie beaucoup, Monsieur l'ambassadeur. Je donne maintenant la parole, pour la Malaisie, à Son Excellence l'ambassadeur Noor Farida Ariffin.

Mrs. ARIFFIN:

1. Merci M. le Président. Mr. President, Members of the Court, it is indeed a great honour and privilege for me to appear before this Court and to represent Malaysia as its Co-Agent in this case. My colleague, Tan Sri Abdul Kadir Mohamad, the Agent for Malaysia, has given you the introduction to our case.

2. I wish now briefly to present to the Court the geographical and social context of the dispute. I will show that the islands of Ligitan and Sipadan, as well as many of the surrounding islands, are part of a group of islands in the Semporna area. Their relation to the mainland will be examined. I will also endeavour to give a brief history of the islands and their economy.

3. As a first step I would like to show the Court a video of the islands of Ligitan and Sipadan.

VIDEO: The islands of Sipadan and Ligitan are part of the State of Sabah in the east of Malaysia. This video introduces the general geographical setting of the islands and shows some of their special features such as their natural beauty and their function as a resource space for the local people. We start from the island of Sabate. In line with the 1891 Boundary Convention, the island of Sabate is divided into two along the 4° 10' N parallel. In June 1891, a joint mission of British and Dutch ships, consisting of HMS *Raddler*, HMS *Igiria* and the Dutch ship HNLMS *Banda*, calculated the exact position of this parallel. A boundary mark was first placed on the west coast of Sabate shown here. Subsequently, the ships placed a beacon on the east coast of the island of Sabate. The distance from Sabate to the island of Sipadan is about 42 nautical miles.

Sipadan is an oceanic island; it is the peak of a mount which rises abruptly for about 600 m under sea level. It may be compared to a mushroom. The stem stands on the sea-bed, many of its features are under water while only a few metres of the cap appear above the sea surface. The distance from Tanjum Tutob, the nearest point on the Sabah mainland to Sipadan is only 14.8 nautical miles. Coconut trees on Sipadan Island were first planted almost 130 years ago by turtle egg collectors from the island of Danawan. The green turtles that make Sipadan their nesting ground, have provided the Bajau ruling community of Danawan a lucrative income for centuries. However, as early as 1914, Britain took steps to regulate the collection of turtle eggs on Sipadan and Ligitan. In 1919, Sipadan was declared a native reserve for the collection of turtle eggs. Turtle egg collection is currently prohibited under Malaysian law. Individuals with the hereditary right to collect turtle eggs on Sipadan, have been compensated. To prevent extinction of the turtles, the eggs are now collected by officers from the Wildlife Department. Turtles visiting Sipadan are tagged and registered. Their eggs are collected and transferred to a hatchery on the other side of the island. Upon hatching, the turtles are released into the sea.

Sipadan was declared a bird sanctuary from 1933 and was indicated as such on the 1935 map of the district. Sipadan Island is still a bird sanctuary today. Visitors to the island are immediately informed of this upon arrival. In 1997, Sipadan and Ligitan became protected areas. The lighthouse on Sipadan Island was constructed in 1962 by the British Government and is currently administered by the Sabah Marine Department. The lighthouse is regularly maintained to ensure the safety of navigation. Access to Sipadan is exclusively via Malaysia. Visitors need official approval to visit the island. The majority of visitors are experienced scuba divers who come to explore the underwater beauty of Sipadan. The diving companies are incorporated in Malaysia. The island of Ligitan lies about 55 nautical miles east of Sebatik and approximately 15.5 nautical miles from Sipadan. Ligitan lies only 21.5 nautical miles to the south-east from the foothill of Hoothill, the nearest point on Sempurna, on the mainland of Sabah. As we approach the island of Ligitan its fringing coral reef is clearly visible. The surrounding waters of Ligitan island are a good fishing ground. For fishermen who regularly fish here, spending a night on Ligitan is very common. Despite the presence of sea snakes on the island, the Pulau or sea gypsies have made the waters around the island their home. A flotilla of boats can be seen present in the area during the day. Furthermore, on the island of Ligitan Bajau Laut and Pulau dry fish and squid. The lighthouse automatically begins to operate as dust falls in Ligitan. The lighthouse has been blinking signals to navigators since 1963. The islands of Danawan, Si Amil, Ligitan, Sipadan, Kapalai, Mabu and Omadal constitute a cluster of islands of which the principal island is Danawan. There is a constant movement of people between them all. Danawan is mainly populated by the Bajau Laut the head man of Dinawan has for the last 100 years come from the descendants of the indigenous leader, Panglima or Chief Abusari. The islands of Danawan and Omadau have their own cemeteries. Sipadan itself is often described as an appendage of Danawan whereby the rights to collect turtle eggs on Sipadan were initially granted by the Sultan of Sulu to the ruling Bajau of Danawan. The group of islands forms an integrated geographic, cultural and social whole and is part of one marine economy. [End of video]

4. Mr. President, Members of the Court, as you have seen, the video has shown both the disputed islands. It would be useful, however, to explain to the Court the macro- as well as the micro-geographical setting of this dispute.

5. The territories of Malaysia fall into two main geographical areas: the Malay Peninsula and the northern part of the island of Borneo, extending from the west to the east coast. Numerous offshore islands are found off the coasts of both Peninsular and East Malaysia. So far as the east coast of Borneo is concerned, all these islands are well known, have names and are described in authoritative sailing guides and pilots. They are also shown on maps of the eighteenth and

nineteenth centuries, with names which are for the most part the same or similar to the names they have today.

The PRESIDENT: Excuse me, may I ask you to speak a little more slowly for the interpreters. Thank you very much.

Mrs. ARIFFIN: I apologize.

Even those islands which were not permanently inhabited were visited by fishermen and others and their resources harvested throughout the period for which records exist. They have long been subject to administrative control by Malaysia and its predecessors in title. There can be no suggestion that any one of them is, or at any time was, *terra nullius*, and indeed Indonesia does not suggest otherwise.

6. Indonesia is an archipelago consisting of thousands of islands of varying sizes of which the principal ones are Java, Sumatra, Sulawesi, Maluku and Irian Jaya. Indonesia also includes the southern part of the island of Borneo under the name of Kalimantan.

7. All boundaries between the two Parties are maritime boundaries, with the exception of the boundary on the main island of Borneo and the adjacent island of Sebatik. Here the boundary was laid down by their respective predecessors in title, Britain and the Netherlands, in the 1891 Boundary Convention. The boundary was formally demarcated when necessary and in particular, by a further treaty of 1915, to which a map was annexed.

8. [Show Memorial of Malaysia insert 3, Borneo Coast, Sulu Archipelago] As you can see from the map on the screen, which has also been included in the judges' folders at tab 4, to the north and east of the large island of Borneo are many small islands stretching in the direction of the Philippines across the Sulu Sea and the Celebes Sea. A particular feature of the region to the east is the chain of islands still known as the Sulu Archipelago. Its main town of Jolo was the seat of the Sultan of Sulu who held sway over these islands and many others in the surrounding seas, including the north-east coast of Borneo itself. [End insert 3]

9. Mr. President, Members of the Court, having explained the macro-geographical setting, I shall now turn to the micro-geographical setting.

10. [Show Memorial of Malaysia insert 13, Semporna Region] The map on the screen, which you will find in your folders at tab 5, shows the north-east coast of Borneo which consists of a series of bays and indentations interspersed with peninsulas, with associated offshore islands. These bays and indentations include Teluk Lahad Datu (Darvel Bay), and, south of the Semporna Peninsula, Sibuko Bay, a large bay formerly known as St. Lucia Bay. To the south of Sibuko Bay is the Celebes Sea. Within Sibuko Bay and north of the island of Sebatik is Teluk Tawau (Cowie Bay). The north shoreline of Cowie Bay is the site of Tawau, the local administrative centre, and slightly to the east of it, Batu Tinagat. Sailing east from the island of Sebatik itself, there is nothing but open sea with some shoals until, 30 nautical miles away, is encountered Terumbu Ligitan or Ligitan Reefs in English. As you can see from the map, Ligitan Reefs and Pulau Ligitan are separate features and it is Pulau Ligitan which is the subject of the present dispute. Ligitan and Sipadan are respectively 19.5 nautical miles and 8.2 nautical miles further to the south-east of Terumbu Ligitan or Ligitan Reefs. [End insert 13]

11. In the nineteenth and twentieth centuries, the islands and reefs along the north-east coast of Borneo have been mainly inhabited and used by the Bajaus, otherwise known as Bajau Laut or sea gypsies. They live mostly in boats or in settlements of stilt houses above water. There is a large settlement in Trusan Treacher, near Semporna, the result of the resettlement efforts of the British North Borneo Company after 1906. The Bajaus have their own language called Sama or Samal. Their occupation, at times relevant to the present case, was mostly fishing and the collection of forest products. They were a key part of the procurement system operated from Sulu until the 1880s, whereby goods such as edible birds' nests, *trepang* or *bêche-de-mer*, rattan, etc., were collected by them and traded through the port of Jolo especially with China. The role of Jolo was largely taken over by the trading centre of Semporna after its establishment by the company in 1887. The local leaders, who were often Sulu, were appointed by the Sultan of Sulu, and given such titles as Panglima, Datu or Temenggong. The company assumed that prerogative after 1878 and confirmed in office or subsequently appointed a number of local leaders who had previously held office under the Sultan.

12. In 1903 the *British North Borneo Herald* published an interesting account of the Bajau cemetery on Omadal, referring also to the Bajau settlements of Silam, Danawan and Semporna.

Bajaus from Danawan have long held the licence to collect turtle eggs on Sipadan, granted initially by the Sultan of Sulu and subsequently recognized by the Government of North Borneo. The licence was reissued by the Government of North Borneo under the Turtle Preservation Ordinance of 1917.

13. [Show MM insert 5, islands around Semporna, Sabah, Malaysia] Mr. President, Members of the Court, with respect to the island of Ligitan, which lies at latitude 4° 09' 48" N and longitude 118° 53' 04" E, it is the southern extremity of an extensive star-shaped reef that extends southward from Danawan and Si Amil islands, which are respectively 8.6 nautical miles and 8.9 nautical miles north of the island of Ligitan. The Ligitan Group includes Sipadan. The islands in this group are shown on the satellite image on the screen and at tab 6 in your folders. Bajaus living on Danawan and Si Amil made use of the whole reef for fishing, and of Ligitan itself for drying fish and other purposes, as you have seen from the video. As shown in the video, Ligitan Island lies about 21.5 nautical miles south-east of the nearest point on the coast which is the foothill of Hood Hill, and is about 15.5 nautical miles east of Sipadan. Most of the reef is submerged, though it shows dry patches in irregular shapes of between 0.3 m and 1.2 m in height. The island is not permanently inhabited but until very recently, there were a number of huts on stilts which were intermittently occupied.

14. At the northern tip of the reef, Danawan lies approximately 15.5 nautical miles south-east of Semporna Peninsula. Nearby, about 0.5 nautical miles to the north-east of Danawan, there is a separate island, Si Amil, on which there is a lighthouse operated by Malaysia. There is also a lighthouse — not just a lantern — operated by Malaysia on Ligitan itself, which you have seen in the video. Ligitan is covered in rocks, wild grass and trees called *bilang-bilang*.

15. Mr. President, Members of the Court, as to the island of Sipadan, it lies at latitude 4° 06' 39" N and longitude 118° 37' 56" E. It is 14.8 nautical miles from the nearest point on the coast. The general direction of the closest mainland coastline in Sibuko Bay is eastwards along the Semporna Peninsula, terminating at Pantau at the eastern end of Bum Bum Island. [End graphic insert 5] As was shown in the video, Sipadan is 42 nautical miles from the island of Sebatik. The nearest exclusively Indonesian island, Pulau Ahus, is 51.2 nautical miles away. Sipadan is neither geographically, ethnographically nor economically associated with any part of Indonesia.

16. Sipadan was originally covered with thick jungle until the time Panglima Abu Sari planted some coconut trees and some maize. It was not what one would describe as an uninhabited island. Although there were no permanent dwellings on the island apart from the semi-permanent wooden hut built by the licensed turtle egg collectors, Panglima Johan and Panglima Nujum, it was visited every night during the turtle egg harvesting season by these turtle egg collectors. A well was dug on the island to provide fresh water on the occasions that the turtle egg collectors spent nights on the islands.

17. Sipadan is part of the administrative district of Semporna in Malaysia: earlier it was part of the district of Lahad Datu. Neither the Netherlands nor Indonesia has ever exercised any authority over it.

18. Because of its unusual structure and unspoiled coral, Sipadan is a very popular tourist centre, especially for scuba divers. This diving activity led to the development on the island of a number of diving establishments and chalets. At its height there were 191 regular residents on the island, none of whom were Indonesian; the number has now been substantially reduced to protect the island from over-exploitation. The chalets and diving companies are registered with the Registrar of Companies, Sabah, with the exception of the Pulau Bajau Resort which is registered with the Semporna District Council. About 100 visitors are present on the island on any given day. Over the past 17 years, 134,631 tourists, mostly foreign, have visited the island. It is hardly the "small privately operated tourist facility" as was so erroneously described by counsel for Indonesia. However, the conservation aspect of the island is given equal importance. For example, the status of Sipadan as a bird sanctuary, derived from the North Borneo Land Ordinance of 1930, is still preserved. Both this Ordinance and the Turtle Conservation Ordinance of 1917 are vigorously enforced by the Sabah Wildlife Department.

19. The nearest inhabited island is Mabul, some 8 nautical miles to the north of Sipadan. Like Sipadan, Mabul is a tourist resort. In addition to the resort employees, there is a settlement of about a thousand people. Some are of Sulu and Philippine origin. There are also about 40 Bajaus who live mainly in boats moored within a few metres of the shore and whose livelihood is fishing.

20. Mr. President, Members of the Court, as was mentioned in the video, Ligitan and Sipadan form part of a group of small islands comprising Mabul, Omadal, Kapalai, Danawan,

Si Amil, Ligitan and Sipadan. In the first edition of the *Eastern Archipelago Pilot*, published in 1890, Sipadan is described as "the southernmost of the group", immediately following a description of Si Amil, Danawan and Ligitan and before the brief mention of Mabul. The geographical closeness of these islands forming the Ligitan group has led to a constant movement of people between them all. I would like to emphasize that the group of islands forms an integrated geographic, cultural and social whole and is part of one marine economy.

Mr. President, Members of the Court, I would like to thank you for the attention that you have given to my speech, and I would be grateful if you would call upon Sir Elihu Lauterpacht to continue Malaysia's presentation. Thank you.

Le PRESIDENT : Je vous remercie, Madame l'ambassadeur. I now give the floor to Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT: Thank you, Mr. President.

1. Mr. President and Members of the Court, I am privileged to have been entrusted with the task of outlining the substantive part of Malaysia's response in more detail than was possible in Ambassador Kadir's opening statement. I will focus on the case as it now appears in the light of Indonesia's most recent statement of its position. The principal elements of Malaysia's response will then be developed in greater detail by my distinguished colleagues Professors Cot, Crawford and Schrijver, and in one respect by myself.

2. There are just a few preliminary points that can be quickly disposed of. First, we will be mindful of the Court's Practice Direction VI requiring parties to comply fully with the terms of Article 60, paragraph 1, of the Court's Rules and thus to avoid unnecessary repetition of what has already been set out at length in the written pleadings. Therefore, wherever possible, my colleagues and I will do no more than indicate the main features of the contention and will provide in the footnotes to our arguments references to the places in the written pleadings where they are more fully elaborated. Of course, we will not read those references, but they will be included in the transcripts of the day's proceedings.

3. Second, the Court will recall that in the arguments of the two sides, references are made to two different sequences of rulers: on the Indonesian side, to the Rulers of Bulungan, to the

Netherlands and, most recently, to Indonesia; on the Malaysian side, to the Rulers of Sulu, to the British North Borneo Company, to Spain, to the United States, to Britain and, most recently, to Malaysia. In order to avoid unnecessary repetition, it will be convenient on some occasions to attribute past actions simply to "Indonesia" or "Malaysia" respectively, despite the fact that the conduct in question was that of one of their predecessors in title.

4. Third, and more important, something must be said about the critical date to which both Sir Arthur Watts and Professor Pellet have referred. Sir Arthur said that "the dispute now before the Court crystallized in 1969". In so far as this was meant to suggest that there was something in the nature of a dispute before 1969, which solidified, so to speak, in that year there is no basis for it whatsoever. Before the maritime delimitation discussions in 1969 neither Indonesia nor its predecessors had given any indication of an interest in or claim to the islands. More likely, however, Sir Arthur meant only what he then said next: "For the purpose of admitting and assessing evidence of the exercise of State sovereignty, any conduct after that date is to be disregarded."[3] And this was also the argument of Professor Pellet. The contention is, with respect, unsustainable. The proposition is now well established in international law that it is not concerned with the admissibility of evidence but with the weight to be given to it. There is no automatic cut-off date for the admissibility of evidence. All the evidence may be looked at. If, to use Sir Arthur's words, it is "self-serving, designed to strengthen, or even establish, that State's claim to sovereignty" its weight will be correspondingly reduced. But that is not the case here. If Malaysia had, by the development of tourist activity on Sipadan, intended thereby to strengthen its case for sovereignty over that island, is it not strange that it waited nearly 20 years before promoting the tourism that generated the first Indonesian protest of May 1988[4]? The truth of the matter lies in two propositions. The first is one of law and is to be found in the award in the *Palena* arbitration over which Lord McNair presided. It is to the effect quite simply that there is no objection to a tribunal taking into account post-critical date activity if it evidences the continuation of a course of conduct openly pursued before the critical date.

---

[3] CR 2002/27, p. 23.

[4] Memorial of Indonesia, Vol. I, para. 8.71.

5. The second proposition is one of fact. In this case the facts of Malaysian activity on and in relation to Sipadan are a natural outgrowth of the character of the island. Scuba-diving is a sport that only become popular in the 1980s. Malaysia did not invent the remarkable physical features of Sipadan with a view to tempting scuba divers to rally to the support of Malaysian sovereignty. Quite to the contrary. Malaysia accepted the responsibilities of sovereignty to ensure the protection of the island's environment as well as the basic needs of the visitors. The most recent official manifestation of that responsibility is the Protected Areas Order 1997 by which Sipadan and Ligitan were declared to be protected areas[5]. The Government was thus empowered to regulate more closely the number of people visiting the islands with a view to protecting their environments.

6. The point that really requires emphasis now is that, without at all diminishing the significance of the continuity of Malaysian presence in the islands over the last 33 years, the fact is that 78 years elapsed from 1891 to 1969 without any sign from Indonesia and its predecessors that it questioned the presence of Malaysia and its predecessors in the islands or the legitimacy of their presence there. This is the point that Malaysia will be repeatedly stressing — for 78 years Indonesia remained totally silent and inactive regarding title to the islands.

7. Moreover, we must bear in mind that this is not a situation in which the presence of the British North Borneo Company of Britain and of Malaysia is any way dependent upon a grant, lease or licence made by Bulungan or the Netherlands. Sipadan and Ligitan have at all times, until most recently, been outside any area claimed by Indonesia or falling under its authority. Britain and Malaysia have not been the licensees of the Netherlands or Indonesia.

8. The Court has just heard from Ambassador Ariffin an illuminating description of the geographical and social context of the present dispute. It is worth emphasizing one consideration to be drawn from what she has said.

9. This case is not about title to two isolated islands set in a far distant ocean from any neighbouring land. Ligitan and Sipadan are in no way similar to, say, Clipperton Island, which was 800 miles from any significant coast and which fell to be examined without reference to its position relative to any other land. As the maps in the video just shown to the Court and insert 5 in the

---

[5] Memorial of Malaysia, Vol. IV, Ann. 123.

Malaysian Memorial so strikingly demonstrate, Ligitan and Sipadan are an integral part of an island unity, comprised of the islands of Omadal, Danawan, Si Amil, and Kapalai closely linked to the adjoining Semporna Peninsula. [Show map.] These islands form more than a geographical unit. They are a social and economic unit. They are used by the local people based in these islands, in the exploitation of the adjacent fisheries and, as regards Sipadan, with a major interest in its turtles and their eggs. When Sir Arthur, in his opening, said that "both islands were occasionally used by seasonal fishermen and turtle egg collectors"[6] he was understating the nature of the use of the islands. True, as he said, "neither island sustained a permanent resident population" — that is prior to the development of tourist facilities — but both were permanent and habitual adjuncts of the populations of the neighbouring islands. The collection of turtle eggs was not occasional but was regular and regulated. The fishermen used Ligitan continuously to dry their fish and nets, and to stay for a period of time.

10. Of course, there have been some changes in recent years. In particular, the economic interest of the people of Semporna, Danawan and Si Amil in turtle eggs as such was replaced by their financial interest in the payments contracted to be made to them by the companies operating the scuba-diving centres on Sipadan. No longer would the owners of the traditional rights to collect turtle eggs continue to exercise those rights. Instead, the scuba-diving companies undertook to purchase all the turtle eggs laid on Sipadan with a view to leaving them there to hatch naturally. None were to be removed save in accordance with the instructions of the Department of Wildlife of Sabah — note, of *Sabah*, not of Indonesia. That position still prevails. The Indonesian authorities have never shown any interest in this significant environmental feature[7]. Their attempt to separate Ligitan and Sipadan from their natural neighbours is marked by the highest degree of artificiality. Not only are these islands a group — they lie in relatively close proximity to the mainland of, initially, Sulu, then of British North Borneo and now of Sabah. Sipadan, the most distant from the coastline to the north, is still no more than 14.8 nautical miles away from the Semporna coast. Ligitan is 21.5 miles distant. But measured from the nearest point on the Indonesian coast, the coast of Sebatik, Sipadan is 42 nautical miles away and Ligitan is 55 nautical miles. Now we know

---

[6] CR 2002/27, p. 20.

[7] Sale and Purchase Agreement, 1993, M/R, Ann. 8.

that in these matters mere proximity or contiguity is not the controlling factor. Judge Huber said so expressly in the *Island of Palmas* case. The Court heard argument to the same effect in the *Qatar* v. *Bahrain* case. But when proximity is coupled with administration, then proximity may properly be given weight. It really hardly needs saying again. When one looks at the map, the cluster of islands of which Ligitan and Sipadan form a part are manifestly separate from the area of Indonesian authority. There is a measure of unreality, of absurdity even, in trying to throw a kind of legalistic bridge over the waters lying between Sebatik and the islands in question.

11. Permit me, Mr. President, now to turn to the essentials of the case. It is striking in the simplicity of its central issues. It is one in which Indonesia claims on the sole basis of a treaty now more than 110 years old title to two islands of which it has never had possession and over which it has never exercised any authority whatsoever. Malaysia contests Indonesia's interpretation of the treaty. That question is at the forefront of the case. The resolution of that question in Malaysia's favour would dispose of the whole case. I will come back to it in a moment.

12. But first I must stress again a basic and inescapable historical fact. These islands are now in the possession of Malaysia, subject to its control and administration, and they have been so at all material times for more than a century and a half. There is not a glimmer of actual display of Indonesian State authority on the islands. Indonesia is effectively a claimant attempting to oust the State in possession from its long-possessed territory. But now, let me return to first things first: the 1891 Treaty.

13. The Court has heard extended argument from Indonesia on this matter. Expressed in its simplest terms, the Indonesian argument is that the words that the boundary line of 4° 10' N shall run eastwards — and now come the crucial words — "across the island of Sebatik", mean not only that the boundary crosses that island but also that it extends into the sea for an indefinite distance.

14. My distinguished colleague, Professor Jean-Pierre Cot will respond to this argument in systematic detail. In the meantime, I will respectfully invite the Court to reflect on a number of questions that identify some significant weaknesses in Indonesia's arguments relating to the interpretation of the 1891 Convention.

15. On Monday, Sir Arthur Watts pointed to the Preamble of the Convention as defining its object and purpose. The words he relied on were: "being desirous of defining the boundaries

between the Netherlands possessions in the Island of Borneo and the States in that Island which are under British protection". Sir Arthur said that nothing limited those boundaries to the land in the island.

Question 1: Why should the definition of the boundaries between the possessions of the Parties "in the Island" extend into the sea more than 50 miles to the east, south of the Semporna Peninsula, when, according to Indonesia's own illustrative map — which is tab No. 6 in their judges' folder of 3 June — the areas of their respective claims to possession were limited to an area of the island of Borneo nowhere near the maritime region and islands in question?

Question 2: In the same order of enquiry, how does a boundary described as running from the east coast of Borneo across that island from east to west come to extend eastwards across the sea more than 55 nautical miles? How is that extension or continuation to be established? Is it achieved only by the use of the words "across the island of Sebatik"? Why after providing that the boundary should continue across the island of Sebatik, was the whole of the rest of that Article, Article (4), concerned only to allocate that portion of the island to the north of that parallel unreservedly to the company and the portion south of that parallel to the Netherlands? If the intention had also been to divide territories lying in the sea, why did the Article not say also, and I invent a quotation: "and those islands situated to the north of that parallel shall belong to the BNBC and those to the south shall belong to the Netherlands"? That would have been the complete and logical way of expressing the objective which Indonesia now says that the Article was intended to achieve.

Question 3: Or, if a shorter form of words would have been preferred, why were the words "across the island of Sebatik" included at all when the meaning for which Indonesia argues could have been achieved simply by saying "from the east coast the boundary line shall be continued eastward along that parallel"? Do not the words "across the island of Sebatik" act as words of limitation, restricting the line to the breadth of that island? And what about the ordinary meaning of the word "across" which means "across", and not "across and beyond"? If you mean a line to stretch "across and beyond" an area, you need to state its ultimate destination in that way — and again I invent a quotation: "across the island of Sebatik to somewhere specific beyond it". It is not enough to leave the line as indefinite but yet not endless.

16. Let us turn from the words of the Treaty. If they are not by themselves sufficient to support Malaysia's case, what then of the additional elements introduced into the argument by Indonesia?

Question 4: Indonesia places dominant emphasis on the Explanatory Memorandum map presented to the Netherlands Parliament in 1891. On what basis can recourse to this map be justified as of varying the meaning of the text? Why, if the 1891 Explanatory Memorandum map is so important an element in the interpretation of the 1891 Convention, was it not annexed to the Convention and made to form part of it? Is one party to a treaty entitled to put its own interpretation on the treaty by means of a unilaterally prepared map which it then contends 78 years later, notwithstanding the conduct of the other party to the contrary, that the other side has accepted? It should be borne in mind that in the *Temple* case, the map that formed the basis of the acquiescence was formally handed by one party to the other in a meeting. That was not the case here. Sir Arthur twice repeated that the map was "officially known" to the British Government[8]. But what does "officially known" mean other than that it reached the Foreign Office and was suitably filed? How many in British circles would have known of the map? And would they have focused on the length of the red line the extension of which could not have been seen as having any relevance? More to the point, what would Indonesia have been able to say now if the British Ambassador in The Hague had simply disregarded or overlooked the map and had not sent it home? The Netherlands did not know how Britain had dealt with the map. Nor did it care. Only in connection with this case was the history of the map resurrected. The map was never officially communicated to Britain and the Netherlands never acted in reliance upon British possession of the map.

Question 5: Why, if the line was intended to be a specific line of allocation, is there no consistency between the various later maps on which it appears — particularly on a map which bears the signatures of Dutch representatives, the map of 1915[9]?

Question 6: By what stretch of interpretation can a line that is spoken of in the Indonesian pleadings as a "boundary" line when drawn across land, and even across the water between the main island of Borneo and Sebatik, suddenly without a variation of wording change its character to a line of allocation in the sea east of Sebatik? It must be recalled, this was at a time — the 1890s — when the concept of an allocation line was clearly understood. Yet the Indonesian Reply contends that an allocation line may be extracted from the language of the 1891 Treaty. In the case of the land delimitation, (to use the words of Indonesia) "the Convention resulted in a boundary line". In the case of the line at sea "it resulted in an allocation of islands on either side of the line". One expression; two different meanings! That is a strange result, to say the least.

---

[8] CR 2002/28, pp. 22 and 23.

[9] Memorial of Malaysia, Atlas, No. 23.

Question 7: Sir Arthur has sought to lend force to his argument by comparing the language of Articles III and IV of the Convention. He points to the express statement in Article III that the boundary runs "from the summit of the range of mountains mentioned in Article II, to Tandjong-Datoe on the west coast of Borneo"[10]. So, Sir Arthur continues, "it is evident that when the Parties intended the boundary to terminate at a point on the coast, they found no difficulty in saying so". And this he contrasts with the language of Article IV. So we come to the next question — which I seem to have forgotten to number, let us say it is question 7 *(a)*: Is it true that Article III described the western terminus of the boundary by saying that it ran to the coast? The answer is that it did not. The boundary ran to a named place, Tandjoeng Dato, which happened to be on the west coast. It reached that town by following the watershed between two identified sets of rivers, those reaching the sea north of Tandjoeng Dato and those reaching the sea south of it. There is no way in which the boundary across Sebatik could have been described in a similar way because there was no named town or place on the eastern coast of that island which could have been identified as its eastern terminus. In any case, in that eastern sector the boundary was formed by a latitudinal line, not by a watershed. The comparison is totally misleading.

Question 8: What explanation can there be of the terms of the joint British-Dutch delimitation "on the spot" — as it was called — in February 1913 of the frontier between British and Dutch territory? This started with the words: "Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude as already fixed by Article 4 of the boundary treaty and marked on the east and west coasts by boundary pillars."[11] There is no word of reference, expressed or implied, to the extension of the boundary eastwards of the pillar on the east coast. And the same question can be asked of the record of the demarcation on Sebatik jointly carried out in May 1914[12]. And yet again the same can be asked of the virtually identical language of the Anglo-Dutch Agreement of 1915 completing the 1913 demarcation[13]. I have already referred to the signed map which accompanies this Agreement.

---

[10] CR 2002/28, p. 15, para. 31.

[11] Memorial of Malaysia, 2, p. 95.

Question 9: Why, if, as Indonesia contends, the boundary line in the sea is so clear, did the Dutch Government find it necessary to give such detailed consideration in 1920 as to where to draw the lines of the territorial sea between the Netherlands and British parts of Sebatik? Surely, if the basic Indonesian contention is correct, the 1891 line would have achieved the necessary delimitation.

17. Permit me to turn briefly to the Indonesian treatment now of Malaysia's title. Malaysia points to this as fully supportive of its assertion of the legal consequences of its long administration of the islands and of its denial of the effect alleged by Indonesia of the terms of the 1891 Convention. This will oe developed more fully by my learned friend, Professor Crawford. In the meantime I need say only the following.

18. In 1885 Britain recognized the sovereignty of Spain over the places occupied, as well as over those places not yet occupied, of the Sulu Archipelago. Spain recognized the retention of sovereignty by Britain over islands within 3 marine leagues down to the Sibuko River — both Ligitan and Sipadan were outside these lines. As a result of the loss by Spain of its title when it was defeated by the United States in the Spanish-American War, the US inherited the underlying title to the offshore islands beyond 9 nautical miles, Sipadan and Ligitan, but agreed to permit the British North Borneo Company to administer the islands. This was the effect of the 1907 Exchange of Notes[14], in which the US Government temporarily waived the right of administration to all the islands westward and southward of the so-called Durand Line of 1906. In 1930 the United States and the United Kingdom agreed on a final settlement, as a result of which some of the islands covered by the 1907 Exchange of Notes, in particular the Turtle Islands, were returned

---

[12] Memorial of Malaysia, 2, p. 102.

[13] *Ibid.*, p. 104.

[14] *Ibid.*, p. 93.

to the United States while others, in particular the five islands south of Semporna including the two in dispute here, remained with British North Borneo[15].

19. *Question 10*: What act of authority by the Sultan of Bulungan or by the Dutch Netherlands Indies Government can Indonesia show over the islands? And after 1891, if the Netherlands had claimed any of the islands, why did it never say so? In particular why did it remain silent in 1907, when Britain and the United States made a public agreement concerning those offshore islands?

20. At this point, I may return to the second main element in the Malaysian case, the first having been Malaysia's interpretation of the Treaty. And this is the legal significance of two related facts: the first is that Malaysia and its predecessors in title have possessed and administered the islands for more than a century and a half. The second fact is the obverse of the first, namely, that in all that time Indonesia and its predecessors in title have never possessed or administered the islands.

21. It is well to recall at the very beginning two sentences in the much cited and respected Award of Judge Huber in the *Island of Palmas* case[16]. These are, I may say, not the same sentences that were the subject of so much discussion before this Court in the *Qatar* v. *Bahrain* case. Those were the sentences relating to contiguity. The ones now referred to are, rather, some of the sentences which follow in a later part of the Award: and they are highly pertinent here:

> "The Netherlands, on the contrary [that is, contrary to the United States argument based on discovery, recognition by treaty and contiguity] found their claim to sovereignty essentially in the title of peaceful and continuous display of State authority over the island [the opposite, I may observe *en passant*, of what Indonesia is now arguing]. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority, it is necessary to ascertain in the first place whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time."[17]

22. Now, allow me please to restate the proposition in Judge Huber's observation in positive terms — and this is how it goes: "A title based on a peaceful and continuous display of State authority would in international law prevail over a title of acquisition of sovereignty not followed

---

[15] Memorial of Malaysia, 2, p. 116.

[16] 1928, II *UNRIAA* 829.

[17] *Ibid.*, p. 867.

by actual display of State authority." Expressed in terms of the present case, even if, as Indonesia claims and Malaysia disputes, the 1891 Convention could have given title to Indonesia, that would not prevail over the title of Malaysia developed and hardened on the basis of its continuous presence in, and administration of, the islands since before 1891.

23. Malaysia possesses the islands and has done so since before the 1891 Convention. Indonesia has never occupied or possessed them. Indonesia's claim thus suffers from two fundamental defects. First, Indonesia's interpretation of the 1891 Convention, on which — and on which alone — the whole of its case rests, is quite unsustainable. Second, Indonesia is trying to oust the State that has, with its predecessors, been in effective possession since the nineteenth century. If the concept of stability of frontiers, which this Court has endorsed on several occasions, has any real meaning, this case is without doubt one in which it applies with self-evident force. The fundamental defect in what the Court has heard so far from Indonesia is its failure to show how the title to which Indonesia pretends on the basis of its interpretation of the 1891 Convention survived the intervening 78 years of British and Malaysian possession until 1969 within the meaning of the principle enunciated by Judge Huber — a principle never challenged.

24. It is simply a matter of comparing what the Netherlands did in relation to the islands with what Britain did. These points will be elaborated in due course by Professor Schrijver, in respect of the limits of Dutch action, and by myself in respect of British conduct. But again, in the meantime, there are a number of further questions which the Court will no doubt wish to consider.

Question 11: Where is the evidence of a single item of Dutch administration, legislation or assertion of title in respect of the islands? Do the occasional tangential passages near the islands of the *Macasser*, 1903; the *Koetei*, 1910; and the *Lynx*, 1921 — three items in a period of 80 years —really amount to "administration"?

Question 12: Where is the evidence of any regular presence of persons on the islands, whether resident or not, who regarded themselves as under the authority of the Dutch? Not a single instance is offered by Indonesia.

Question 13. How does Indonesia displace the significance of the open and undisputed inclusion of the islands within the administrative districts of the British Semporna Peninsula?

Question 14: Regrettably the last: where is the evidence of any economic activity in the islands, especially the collection of turtle eggs, by the inhabitants of Dutch territory living south of the 4° 10' line?

25. I shall return to the significance of these last four questions when later I address the Court on the subject of *effectivités*. It is Malaysia's contention that there are no answers to any of these questions that can support Indonesia's position. In consequence, Malaysia submits that the Court should find that sovereignty over Ligitan and Sipadan belongs to Malaysia. This submission will now be developed in greater detail by my colleagues.

Mr. President, unless you find it convenient to take a break at this point, may I ask you now to call upon my colleague, Professor Schrijver, to address you.

The PRESIDENT: Thank you very much. I think it would be convenient to have the break at this stage. La séance est suspendue pour une dizaine de minutes.

L'audience est suspendue de 16 h 30 à 16 h 40.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise. Je donne maintenant la parole, au nom de la Malaisie, au professeur Schrijver.

Mr. SCHRIJVER: Merci.

DUTCH CLAIMS TO BORNEO'S EAST COAST AND ISLANDS BEFORE 1891

Introduction

1. Mr. President, Members of the Court. Since this is the first time that I have the honour of addressing you in this courtroom, I would like at the outset to express my deep respect for your distinguished Court and to record my pleasure at participating in these proceedings on behalf of the Government of Malaysia.

2. My task today is to examine the issue of supposed Dutch claims to East Borneo in the period leading up to the 1891 Boundary Convention between Great Britain and the Netherlands.

3. In its Memorial, Indonesia dealt extensively with the issue of the Dutch relationship with the Sultanate of Bulungan and its geographical extent. The major part of Chapter III as well as the

entire Chapter IV, entitled "The pre-1891 situation", were devoted to it[18]. The Counter-Memorial also addressed the pre-1891 situation, but took the view that ambiguities may have existed and that the ownership of islands in the area on either side was uncertain[19]. Subsequently, we learnt from Indonesia's Reply that it had shifted to the view that the pre-1891 history and the existence of valid claims in that period were "an irrelevance"[20].

4. Hence, over time Indonesia appears to have completely dropped Bulungan as a basis for its claim to the islands of Ligitan and Sipadan. It now appears to base its claim to the islands entirely on the interpretation that the 1891 Boundary Convention represented a compromise between the Dutch and the British, not only with respect to the mainland, but also with respect to island possessions. As Sir Arthur Watts in his speech overviewing the case pointed out: "there is . . . no need for this Court to consider the merits of the rival claims of the Sultans"[21], the Sultan of Bulungan and the Sultan of Sulu.

5. Nevertheless, my distinguished colleague Professor Soons took time to survey the whole history of north-east Borneo prior to the 1891 Boundary Convention[22]. Indonesia appears to hobble back and forth between two views when it returns from time to time to the Dutch contracts with Bulungan.

6. Malaysia is of the view that for a proper understanding of the case, history and practice before 1891 do matter. They provide the background of the diplomatic rivalry between Great Britain and the Netherlands in nineteenth century Borneo. Furthermore, they show decisively what the 1891 Convention was about.

7. Hence, Mr. President, Members of the Court, I will first briefly give an overview of Dutch colonization of the island of Borneo — a colonization which started late and was desultory. Secondly, I will review the features of the Sultanate of Bulungan on which Indonesia initially put so much reliance as a basis for its claims to sovereignty over the islands in dispute. In reality,

---

[18] Memorial of Indonesia, pp. 9-27 and pp. 37-60.

[19] See Counter-Memorial of Indonesia, Vol. 1, p. 41, para. 3. 86 and p. 86, para. 5.61.

[20] See Reply of Indonesia, p. 9, para. 1.5, and p. 101, para. 5.40 *(f)*.

[21] CR 2002/27, p. 25, para. 35 (ii).

[22] CR 2002/27, pp. 26 *et seq.*

Bulungan was a mainly land-based Sultanate, whose sway in any case — and that is my next issue — did not pertain to islands of the Ligitan Group, also known as the Sulu islands.

8. Fourthly, I shall demonstrate that, in practice, Dutch sovereignty was never exercised or even claimed east of Batu Tinagat. Fifthly and finally, I shall make clear that the sporadic Dutch naval activities in the area before 1891 cannot be viewed as exercises of territorial jurisdiction over the Ligitan Group.

I. Dutch colonization of Borneo started late and was desultory

9. I would like first to look at the Dutch colonization of Borneo. Mr. President, we are dealing with two small islands, which are part of the complex of islands off the coast of North Borneo. Despite Borneo's huge size, the island was largely unknown to Europeans for a considerable period of time. It was not until the mid-eighteenth century that the Dutch managed to gain actual footholds in the south-eastern part of Borneo[23].

10. The Dutch were able to maintain their dominant position in western and southern Borneo for a short period only. Fierce competition to the Dutch soon emerged, from the trading ships of other nations, including the Chinese and the British East India Company. While the Dutch exerted influence mainly in the western and southern parts of Borneo, the British established themselves in the north and north-east. The truth is that the Dutch took little interest in East Borneo as it was on the outskirts of its colonial empire that was already over-extended at that time.

11. Moreover, as Professor Fasseur of Leiden University observed, after 1830 the Netherlands embarked on a policy of self-restraint: it concentrated on the economic exploitation of Java and merely maintained the status quo in the outer islands. This policy of *abstention* was also practised with respect to Borneo[24].

12. Such claims as the Dutch made with respect to north-east Borneo were essentially reactive in nature. These claims arose in response to events such as the arrival of James Brooke in Sarawak in the early 1840s, the grant of North Borneo by the Sultan of Sulu to Von Overbeck and Dent in 1878, the according of a royal charter by the British Government to the newly-established

---

[23] **See Memorial of Indonesia, pp. 55-56 and Counter-Memorial of Malaysia, App. I, Houben study.**

[24] **See Counter-Memorial of Malaysia, App. I, Houben study.**

British North Borneo Company in 1881 and the establishment of a British protectorate over Sarawak, Brunei and British North Borneo in 1888.

13. Each time these events gave rise to some diplomatic activity reflecting rivalry in the area, although overall Anglo-Dutch relations were very cordial during the second part of the nineteenth century. On various occasions such events also triggered a decision by the Dutch Government — sometimes spurred by parliament — to undertake efforts to strengthen Dutch presence in and administration of parts of Borneo.

14. [Project map of Dutch Borneo, Southern and Eastern Division, book Irwin.] In this context, the Government of the Netherlands East Indies concluded or renewed contracts with local rulers, including the Sultans of Pasir, Koetei, Sambalioeng, Goenoeng Taboer and Bulungan. The location of these Sultanates is shown on the map on the screen, which is taken from the book *Nineteenth-Century Borneo* by Irwin and which is in the judges' folders under tab 10. These areas came under the administration of the Dutch Resident in Bandjermasin, head of the Southern and Eastern Division of Borneo and as such, the chief colonial officer in the area *(Zuider- en Oosterafdeeling)*. These contracts included the right of the Dutch to establish themselves in the region, to exploit the natural resources in the area and to conduct trade, to the exclusion of other foreign powers.

II. Bulungan was a mainland-based Sultanate in eastern Borneo

15. Of particular relevance, and that is my second item today, is the series of contracts with Bulungan in the eastern part of Borneo, which emerged from the Sultanate of Berou as a separate sultanate in the early nineteenth century. The northern part was called the Tidung lands, which had first been conquered by Bulungan and later officially became part of Bulungan through various royal marriages. [stop projecting map] Here I would also like to refer to the informative study by Professor Houben, a specialist in the field of south-east Asian history, which appeared as an Appendix to Malaysia's Counter-Memorial. In its Reply Indonesia seeks to downplay Professor Houben's study by calling it "a note" and "a short study"[25], but as a matter of fact Indonesia has made no attempt to provide an equivalent expert study.

---

[25] **See Reply of Indonesia, Chap. 5.**

16. On 2 June 1878, the Dutch renewed the Contract with the Sultan of Bulungan which is under tab 11 of your folders. In this Contract the northern boundary of Bulungan was determined as being contingent with: "the Sulu possessions: at sea the cape called Batu Tinagat, as well as the Tawau River".

17. This is not to say that the Sultan of Bulungan, or for that matter the Dutch, could exercise control in these northern territories. As the Dutch Government plainly admitted to Parliament in 1879[26]: "The north-east and north-west part of Borneo have never been under our dominion. We have never disputed the authority of Spain over the dependencies of Sulu in the north-east portion of the island."

18. The 1878 grant by the Sultan of Sulu provided that the southern border of the area under the control of Dent and Von Overbeck would be the Sibuku River, thus overlapping the territory of the Sultan of Bulungan under Dutch influence. This territory was claimed to extend to Batu Tinagat. Both the British and the Dutch agreed that the area in dispute lay between the Sibuku River and Batu Tinagat. A sketch-map is now being shown and is also included under tab 12 of the judges' folders.

19. There can be little doubt concerning the location of the river Sibuku in the northern part of the Tidung lands, despite the confusion which may arise from what Professor Pellet said with respect to the river Subakun in Darvel Bay on Monday[27]. The Sibuku River is shown in essentially the correct place in contemporary Dutch atlases, as can be seen for example in the enlargement of the 1881 Atlas by *De Sturler*, reproduced as map 1 in the Indonesian Map Atlas, and also as can be seen from the authoritative 1870 Versteeg *General Atlas of the Netherlands Indies*, reproduced as map 3 in Malaysia's Map Atlas. Extracts of both maps are included in the judges' folders under tab 13. While Professor Pellet may not yet be willing to drop the point, the Dutch did so nearly straightaway in the 1880s.

20. During the 1870s and 1880s several incidents occurred between the Netherlands and the British North Borneo Company which highlighted the necessity of resolving this territorial dispute.

---

[26] In Dutch: *"zijn aan ons gezag te alle tijde vreemd geweest"*. See Memorial of Malaysia, p. 75, and Memorial of Malaysia, Vol. 2, Ann. 40.

[27] CR 2002/27, pp. 44-46, paras. 26-28.

Professor Soons also referred to these in his presentation[28], and there is hence no need for me to repeat what we have already stated in our written pleadings. Great Britain filed various protests against the border at 4° 20' N claimed by the Dutch. A lengthy but inconclusive diplomatic exchange followed, especially during the period 1879-1882. The correspondence is remarkably well documented in the General State Archives here in The Hague and the Public Record Office in London. What matters is that in the hundreds of pages of these documents there is not one single reference to any island of the Ligitan Group. [Stop projecting map]

21. Mr. President, the diplomatic contacts resulted in the Joint British-Dutch Commission. The relevant negotiations took place during the period 1889-1891. Both Indonesia and Malaysia have extensively reviewed these interesting negotiations for the 1891 Boundary Convention[29]. Tomorrow, my colleague Professor Cot will address these *travaux préparatoires* in some detail.

III. The Dutch contracts with Bulungan did not pertain to the Ligitan group of islands

22. I now proceed to the question whether the Dutch contracts with Bulungan pertained to the Ligitan group of islands. As already repeatedly mentioned in the pleadings of both Indonesia and Malaysia, the various contracts between the Netherlands and the Sultan of Bulungan identified specific islands as belonging to Bulungan. The relevant part of the 1878 Description of the Boundaries and Statement of the Islands belonging to it is now on the screen and can also be found under tab 14 in your folders[30] [project relevant part of 1878 Contract]:

> "Description of the Boundaries of the Kingdom of Boeloengan and Statement of the Islands Belonging to it:
>
> ……………………………………………………………
>
> The following islands belong to Boeloengan, viz.:-
>
> Terekkan, Nanoekan, and Sebittikh, with the islets belonging thereto."

Terakkan, Nanoekan, and Sebittikh, with the islets belonging thereto.

23. The phrase "islets belonging thereto" *("met toebehoorende eilandjes")*, referring to the islets appertaining to the islands Terakkan, Nenoekkan and Sebatik, is to be understood to mean the

---

[28] CR 2002/27, p. 34, para. 33.

[29] See Memorial of Malaysia, pp. 91-94, Memorial of Indonesia, pp. 26-27 and pp. 74-78.

[30] Full text in Memorial of Malaysia, Vol. 2, Ann. 11.

series of small islands in the immediate neighbourhood of, and most notably between, the islands of Sebatik, Nanukan and Tarakan. [Stop projecting text and now show map with the small islets]

24. The phrase "islets belonging thereto" of course evidently refers only to the configuration of small islands in the vicinity of the named islands, most notably those now on the screen and under tab 15 of the judges' folders. They are found mostly between the islands of Sebatik and Nunukan and the island of Tarakan. Most of these islets carry a name and include Tina Basan, Bukat, Ahus, Baru, Tibu and Bunju.

25. The Sulu islands, including Sipadan and Ligitan, have never been referred to in these contracts or in any related document. They are simply not in the immediate vicinity of Sebatik, Nunukan and Tarakan. Mr. President, could any reasonable interpretation give rise to the assumption that Pulau Sipidan, at 42 nautical miles from Sebatik, and Pulau Ligitan, at 55 nautical miles, come within the scope of the phrase "islets belonging thereto" *("toebehoorende eilandjes")*? [Stop projecting map]

26. When the contract of 2 June 1878 was reported to the Dutch Parliament, there was certainly no reference to any claim by the Netherlands to islands in the Ligitan Group, islands not in the vicinity of Bulungan but offshore islands at a considerable distance in the Sulu Sea. Neither was there such a reference in the extensive debates in the Second and First Chambers of the Dutch Parliament in response to alleged incursions by the British into Dutch territory[31].

IV. No Dutch sovereignty was ever claimed east of Batu Tinagat

27. As admitted by Indonesia in its written pleadings, there was never, at any time, an attempt by the Dutch negotiators to claim any territory east of Batoe Tinagat or islands east of Sebatik. Let me quote here what has been so aptly described by Indonesia itself in its Memorial, at page 74[32]: [project text]

> "throughout the second half of the 19th century the history of the north-eastern area of Borneo saw a steady increase in the territorial extent of British authority at the expense of the Dutch: in effect the Dutch were on the retreat . . .".

---

[31] Memorial of Malaysia, Anns. 40 and 42.

[32] Memorial of Indonesia, p. 74.

28. As pointed out, and documented in Malaysia's Reply, there is ample evidence of the Dutch considering Batu Tinagat as "the point of demarcation" and of the recognition by the Dutch authorities of territory being under British influence east of Batu Tinagat. Mr. President, there is no need here to repeat these arguments, apart from recalling what was frankly admitted by the Dutch Ministers of Colonies and Foreign Affairs when tabling the draft law to approve the ratification of the 1891 Boundary Convention[33]: [project text]

> "The Dutch Government has never paid much attention to her territory at the Eastern coast of Borneo which was unknown to her and moreover totally uninhabited; that the rights of the Sultan of Boeloengan on the disputed area cannot be called totally indisputable . . ."

29. By the phrase "disputed area" in the text I just quoted, the Ministers meant the area between the Sibuku River and Batu Tinagat to which I referred earlier. Moreover, it is a known fact that, and I now quote from what was reported in the same Explanatory Memorandum[34]: [project text],

> "The Bajaus who live on the islands located at the North-Eastern coast of Borneo, which belong to the Sultanate of Solok, still continuously collect forest products in the disputed area and show no concern whatsoever for the Sultan of Bulungan."

30. In a similar vein, in 1888 Count de Bylandt had dismissed the proposal to grant the Dutch Batu Tinagat in the form of an enclave[35].

31. During the ratification debate in 1892, the Dutch Minister for Foreign Affairs even considered that the claims of Bulungan to Batu Tinagat could not be proved and "were in reality imaginary"[36]. "Imaginary", Mr. President.

32. While this week we have seen all kinds of maps, not one single map includes islands of the Ligitan Group as being part of the Sultanate of Bulungan.

V. There was no exercise of jurisdiction over the islands

33. Mr. President, distinguished Members of the Court, I would now like to proceed to my fifth issue: was there any Dutch exercise of territorial jurisdiction over the islands in the period

---

[33] Memorial of Malaysia, p. 100, full text in Memorial of Malaysia, Vol. 4, Ann. 51.

[34] Memorial of Malaysia, Vol. 3, Ann. 51.

[35] Memorial of Malaysia, p. 78.

[36] Counter-Memorial of Malaysia, p. 28 and Memorial of Indonesia, Ann. 84, Vol. 3.

leading up to the conclusion of the 1891 Boundary Convention. After extensive research on both sides, neither Indonesia nor Malaysia has found any evidence of the Netherlands exercising territorial jurisdiction over the islands prior to 1891. This is not surprising, since no relevant power in the region, including the Netherlands itself, considered this part of the Sulu region to be within the realm of the Sultan of Bulungan or the Netherlands East Indies.

34. There is, however, some difference of opinion with Indonesia as regards the relevance of the movements in the area of the Dutch navy vessel *Admiraal van Kinsbergen* in 1878 when it took soundings and anchored off the coast. A landing took place on Mabul, but not on Sipadan. In its Counter-Memorial Indonesia goes so far as to argue that "this shows that at the time the Dutch considered that the island [they refer to Mabul] belonged to the Sultan of Boeloengan"[37]. The island of Mabul lies only 7.5 nautical miles away from Sipadan. Mr. President, if the Dutch would have claimed Mabul and surrounding islands, *why* did they not mention this at all in the 1889-1891 negotiations? It would have been an extra card in a poor hand!

35. Moreover, with respect to this *van Kinsbergen* voyage my distinguished counterpart, Professor Soons, claimed that "the Dutch naval presence *throughout this period* proves the position of the Dutch Government that their sovereignty, through the Sultan of Boeloengan, extended at least up to this area"[38]. Throughout the period, Mr. President, up to 1891. However, both Indonesia and Malaysia have failed to find any evidence of this in the archives or elsewhere[39].

36. Obviously, isolated cases of Dutch ships steaming through the area and reportedly sighting Sipadan cannot be regarded as a serious indication that Bulungan's title extended that far off the coast, and it is certainly not evidence for Professor Soons', frankly rather wild, assertion of a Dutch presence "throughout the period".

VI. Conclusion

37. Mr. President, kindly allow me to wind up by drawing three conclusions.

38. Firstly, as regards pre-1891 Dutch claims to Borneo's east coast and islands, Malaysia has not found a single sentence, a phrase or a word which directly or indirectly contains, or could

---

[37] Counter-Memorial of Indonesia, Vol. 1, p. 34, para. 3.63.

[38] CR 2002/27, p. 33, para. 30; emphasis added.

[39] Reply of Malaysia, p. 36.

be interpreted to contain, any claim on the part of the Sultan of Bulungan or the Dutch authorities to territory east of Batu Tinagat.

39. Secondly, the same applies to offshore islands and the maritime area to the east and north-east of the islands specifically mentioned in the contracts and supplementary agreements between the Sultan of Bulungan and the Netherlands, such as the islands of Tarakan, Nunukan and Sebatik. Nor is anything reported in this regard in the Dutch Annual Reports on the Colonies, in other official colonial documents such as the mail reports or memoranda of transfer by local Residents, in parliamentary proceedings or in travel accounts.

40. Accordingly, Mr. President, and this is my last conclusion for today, we can fully share the Indonesian view, albeit on quite different grounds, that as there were no pre-1891 Dutch claims to these islands, the nineteenth century history of Bulungan is indeed "an irrelevance".

41. Mr. President, this concludes my intervention at this stage. Mr. I now invite you to call upon my colleague Professor James Crawford. Thank you, Mr. President, distinguished Members of the Court, for your very kind attention.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now give the floor to Professor James Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court.

THE EXTENT OF BRITISH NORTH BORNEO IN 1891 AND ITS IMPLICATIONS FOR INDONESIA'S CLAIM

Introduction and overview

1. My task is to show how Malaysia acquired title to the two disputed islands, Ligitan and Sipadan, and indeed to the Ligitan group of islands as a whole, by virtue of transfer from, or relinquishment by, its predecessor in title, the United States. I am going to do that in two stages. Today, I will show the position as it was prior to the Convention of 1891. Tomorrow I will deal with the transactions with the United States.

2. Let me first, however, place these issues within the context of the case as a whole. For you do not actually need to decide how Malaysia acquired title to the islands, if you reject Indonesia's argument based on the 1891 Convention.

3. That proposition — I don't say it's a confession of irrelevance — rests on an elementary proposition of law and on two elementary facts: one of the facts is agreed, one of them cannot reasonably be disputed.

4. The elementary proposition of law is as follows. You only have to decide this case between Malaysia and Indonesia. Indeed you *can* only do so. In judicial proceedings, title is relative, as Judge Huber said in the *Island of Palmas* case[40]. In order to succeed, one claimant only has to show that it has a better claim than the other. It does not have to show a title good against the world. When it comes to title, some facts are better than no facts, and many facts are better than a few facts.

5. And there are two elementary facts in this case. First, the Dutch had no title to the Ligitan Group before 1891. It can hardly be disputed that the claims of Bulungan did not extend so far. To say that the Ligitan Group was part of the Tidoeng lands is frankly fantastic, and my friends have not been able to find or have not attempted to find a Dutch historian of Borneo who would dare to say that. In its Memorial, Indonesia relied heavily on the connection between Bulungan and the Ligitan Group. But as the pleadings have proceeded — and you have heard — this claim has receded into the background: "the Disappearing Sultan", Agatha Christie would have called it. In its Reply Indonesia is reduced to saying that the question was "uncertain"[41], and that the Court did not actually need to resolve the question. It said so again this week: the word "uncertainty", which occurred 14 times in the Reply, sprang to the lips of Sir Arthur Watts any time he referred to anything before 1891[42]. Indeed the Court will wonder at the alchemy by which *uncertainty* in 1891 was transformed into *certainty* and a treaty title in 1892. But in 12 years of negotiations — well, rather in the negotiations that spanned 12 years in two stages from 1879 to 1891 — the Dutch never on any occasion asserted any title to the islands at all, as Professor Schrijver has just shown you. So that is the first fact.

6. The second fact is this. After 1891, neither the Netherlands nor Indonesia exercised actual authority over the islands. By contrast the BNBC, Britain and Malaysia did exercise at least some

---

[40] *Island of Palmas case*, *RIAA*, Vol. II (1928), pp. 838-839, 868.

[41] Reply of Indonesia, Introduction, paras. 3-4; see also paras. 5.38, 5.40 *(a)*.

[42] C[illegible] 2002/27, pp. 21 (Sir Arthur Watts), 56 (Sir Arthur Watts) (3 times), 50-51 (Prof. Pellet), 57 (Sir Arthur Watts), 58 (Sir Arthur Watts) (3 times); CR 2002/28, p. 26 (Sir Arthur Watts).

such authority. It is true that Indonesia tries to point to cases where Dutch ships went ashore at Sipadan. The captain of the *Lynx* may not have read and indeed could not have read the *Western Sahara* case: if there was no one there, he might have thought he was entitled to go ashore. You heard from Professor Soons Indonesia's case on *effectivités* between 1891 and 1969. It was effectively a one-card trick, the card being the *Lynx*: a solitary animal, the lynx. In fact Professor Soons probably spent longer talking about the *Lynx* on Monday than the *Lynx*'s boarding party spent on Sipadan on 26 November 1921[43]. Then Professor Pellet had the nerve to suggest that this was continuous administration[44]. Even if the *Lynx* was exercising territorial jurisdiction during that brief half an hour — and came back empty-handed — in November 1921 (and Professor Schrijver will tell you tomorrow that it was not), that single incident is nothing as compared with the record of BNBC, British and Malaysian administration over the years. So this much is clear, and it is the second elementary fact: there is a great deal more by way of actual administration of the islands by Malaysia and its predecessors than there is by Indonesia and its predecessors. That is the second fact.

7. These two facts being established, the Indonesian claim fails if its case on the treaty fails. Without the treaty, no one could even begin to say that it had a better title to the islands than Malaysia. All you have to do is to decide on the treaty, and everything else is an unnecessary complication.

8. So, you might ask, why am I presenting the issue of title to the Ligitan Group, including Sipadan and Ligitan, when all Malaysia has to do is show that it is right on the interpretation of the treaty?

9. Well, the first and the simplest reason for doing so is that it is the truth. It corresponds to what happened. It reflects the historical record — I am afraid I was trained in history as well as in the law. Indonesia's claim was presented for the very first time, as a matter of historical fact, in 1969. By contrast, Malaysia's claim corresponds with the actual transactions, with what the politicians, diplomats and administrators thought and did at the relevant times. It is Indonesia's case which is artificially constructed, not Malaysia's.

---

[43] Memorial of Indonesia, Vol. 4, Ann. 120.

[44] CR 2002/27, pp. 56-57 (Prof. Pellet).

10. The second reason for doing so — the first reason for my dealing with this issue is that it reflects the historical truth — is that we can actually show the process by which Malaysia came to have title to the islands clearly enough through the documents. It is true that it did not happen in a single transaction but through a series of transactions, in the period from 1885 to 1930. But fortunately we have good records for each of the transactions concerned. They were the Tripartite Protocol between Britain, Germany and Spain of 1885[45] — sometimes referred to as the Madrid Protocol —, the Anglo-American Exchange of Notes of 1907[46] and the Anglo-American Boundary Convention of 1930[47]. We know what issues the parties to those treaties had to face; we know how they resolved them. We also know from the record that these treaties dealt with quite different issues from those discussed between Great Britain and the Netherlands which led to the 1891 Boundary Convention. There was simply no overlap between the negotiations.

11. And the third reason for dealing with the issue of title is this. It is an independent basis for establishing Malaysia's sovereignty over the islands. In order to succeed in this case, Indonesia has to show a whole series of things. It is not enough for Indonesia to show that the 1891 Convention somehow allocated the two islands to Dutch Borneo. Even if that were true, it would not get Indonesia home. Because Great Britain could not have allocated the two islands to Dutch Borneo, even if it had wanted to. The Ligitan group of islands was not part of the British protectorate of North Borneo at the time of the 1891 Convention, and the Parties *agree* that it was not. *Nemo dat quod non habet*. The British could not give to the Dutch in 1891 title to islands which, on any view of things, were not part of North Borneo. And the subsequent history, especially the transactions of 1903 to 1907 involving the United States, *shows* that this was so. It shows that the Indonesian claim has no purchase at all in the historical record.

12. [Tab 14. Sulu grant and the territorial dispute with the Philippines.] In three rounds of written pleadings, and now in its first oral round, Indonesia has never faced up to this difficulty. It continues to argue as if all it needs to show is that the 1891 Convention allocated the two islands to the Dutch. This gives it, as it said in its Reply and again this week, a "clear treaty title" to the

---

[45] Memorial of Malaysia, Vol. 2, Ann. 15.

[46] Memorial of Malaysia, Vol. 2, Anns. 23-24, together with the annexed map (the Durand map), Memorial of Malaysia, Vol. 5, Map 6.

[47] Memorial of Malaysia, Vol. 2, Ann. 29.

islands[48]. And all that Professor Pellet said about prescription was predicated upon a clear treaty title. But let us accept — for the sake of argument only — that Indonesia might be right about the interpretation of the 1891 Convention. Even on that basis, Indonesia would not have a treaty title. And the reason is that in 1891 the two islands were not part of North Borneo. They were not British to give. As you can see from the graphic on the screen (tab 14 in your folders), the islands were not included in the Sulu grant of 1878 — indeed you have already said so. Nothing happened between 1878 and 1891 to change that situation. The situation was expressly reaffirmed in 1885, when Great Britain and Germany finally recognized Spanish claims to all the areas of Sulu not contained in the 1878 grant, and Spain, in return, recognized British rights to North Borneo and the islands within nine miles, that is, the islands covered by the Sultan's grant of 1878.

13. Thus in 1891, Great Britain was bound by a public act, the Protocol of 1885, to recognize as Spanish all the Sulu islands beyond 9 miles from the coast of Borneo down to the Sibuko River. Moreover Britain knew at the time that the Dutch laid no claim to the islands south of Darvel Bay. It had been repeatedly told in correspondence and in the negotiations that the Dutch claims extended no further east than Batu Tinagat. If the Protocol of 1885 had affected Dutch claims, why did the Dutch not protest? The answer is clear. As Dutch maps showed, the area including the two islands was accepted by the Dutch as belonging to Sulu; they were Sulu possessions beyond the seashore, we might say.

14. So how on earth, even if it is right on the interpretation of the 1891 Convention, can Indonesia succeed? It has never bothered to tell us. Its claim completely lacks coherence. It has never administered the islands. It relies on an alleged allocation of them by a treaty with Britain at a time when they did not belong to Britain. So where can this clear Indonesian treaty title come from? An allocation line in a treaty can only allocate islands that belong to the parties to the treaty. Indonesia ignores this difficulty. All we have is silence. An allocation line in a treaty can only allocate islands that belong to the parties to the treaty. [End tab 14]

15. Mr. President, Members of the Court, I apologize for the repetition, but the dust ably thrown up by our opponents makes it necessary to be crystal clear. If you reject Indonesia's

---

[48] Reply of Indonesia, Introduction, paras. 2, 13.

argument on the interpretation of the 1891 Convention, the case is over: it is the very foundation stone of their case. But even if, hypothetically, you were to accept Indonesia's argument on the Convention, you would have to go further. You would have to decide how it is that the Netherlands could have acquired the islands when neither the Netherlands nor the BNBC had title to them in 1891. Even if, improbably, Indonesia is right on the 1891 Convention, you still have to decide what happened to title to the islands, based on events after 1891. Malaysia presents its argument on that point, and supports it with historical and legal documents. From Indonesia what does the Court have? No theory at all, and, above all, no facts.

16. Indonesia has made much about the contradiction between Malaysia's case on title and its case on administration — the word "contradiction" occurs to the lips almost as much as "uncertainty". But Malaysia's story is internally consistent and not at all contradictory, as I will show. On the other hand, there is a contradiction at [illegible] heart of Indonesia's case. Indonesia claims a treaty title over two islands by virtue of a treaty with a State which, it says, did not have title to the islands when the treaty was made, and never has had it since. Now *that* is a contradiction.

Transactions affecting North Borneo and the islands before 1891

17. Mr. President, Members of the Court, I turn then to the transactions affecting North Borneo before 1891. In doing so I want to make an essential preliminary point. Indonesia consistently talks about the two islands as if they were isolated uninhabited islands in the middle of the ocean. But as we have shown, Ligitan is not isolated at all: it is physically part of a single reef structure with Danawan and Si Amil. Sipadan, it is true, is an oceanic island, which is why the scuba divers like it. It is some miles away, but it has always been considered to be part of the Ligitan group of islands. Read the 1890 British Sailing Directory[49], and also the second edition of 1902 which Indonesia put in its Reply[50]. Both treat Sipadan as part of something called the Ligitan Group, and that phrase appears on contemporary charts.

18. And the point is this. Before 1889, no one spoke about the 4° 10' parallel. It was chosen late in the negotiations for the 1891 Convention because it happens to be the longitude of

---

[49] Counter-Memorial of Malaysia, Vol. 2, Ann. 1.

[50] Reply of Indonesia, Vol. 2, Ann. 4.

Broershoek, and for no other reason. In the Sulu period, no one would have contemplated having title to these two tiny islands: it would have had to be to the whole group of islands. To talk about Bulungan in 1878 having title to Sipadan and Ligitan would have been completely baffling: just because they were below 4° 10', would have been a complete *non sequitur*, a complete anachronism. But that makes the absence of any mention of the Ligitan group of islands even more incredible, if they were claimed by the Netherlands. It would have been giving up larger islands in the group in order to keep smaller ones. That would have called for discussion, if it had been intended. But of course it was not.

19. Indonesia rather feebly says that it would be wrong "to give the impression that the Netherlands had given up all claims and all presence east of Batu Tinagat"[51]. There is no evidence of any such claims or any such presence, as Professor Schrijver has demonstrated. They were never expressed in a formal document, they were never the subject of the slightest protest or action on behalf of the Dutch. They were not shown as Dutch on any map. There is no documentary evidence. There is no single name of a Bulungan official associated with the islands — or for that matter a Dutch official, during the whole of the period prior to the 1891 Convention. Any Dutch claim to the islands is completely inconsistent with the negotiating history of the Convention.

The extent of the Sultanate of Sulu before 1878 and the scope of the 1878 Grant

20. So if the Ligitan group of islands was not part of Bulungan, was it part of Sulu? According to Indonesia, the position of the islands in 1891 was completely unclear. Mr. Bundy said that Malaysia had provided *"absolutely no evidence"* of Sulu control[52].

21. [Tab 15: 1870 Dutch map] In fact the position before 1878 so far as concerns the islands off north-eastern Borneo is sufficiently clear from the historical record and doesn't square with Mr. Bundy's proclamation. In particular, the documents before the Court show the following:

(1) In his account of Sulu possessions on Borneo in 1837, Hunt specifically identified Sipadan, with its "abundance of green turtle", as belonging to Sulu[53].

---

[51] Reply of Indonesia, para. 5.23.

[52] CR 2002/28, p. 45 (Mr. Bundy).

[53] Memorial of Malaysia, Vol. 3, Ann. 34, as quoted in Memorial of Malaysia, para. 5.4.

(2) In his "Notes on Borneo" of 1855, the Dutch official von Dewall expressly admits that the local chiefs on the north-east coast "can only be considered as tributary to Sulu". They have Sulu titles, whereas the people of the Dutch territories "do not venture upon the sea"[54]. He was right about that: the Sultan of Bulungan had no navy. How could he have exercised authority over the islands without any ships? You can't swim that far, and there is no evidence that he could swim at all.

(3) By contrast agents of the Sultan, whose names we know, exercised authority over the islands on the east coast, including Omadal[55]. Indonesia concedes that the Sultan of Sulu appointed headmen on Danawan[56], which is part of the Ligitan Group, and is closely associated with Sipadan.

(4) The islands were shown as part of Sulu on Dutch maps. The map shown on the screen, and in tab 15 in your folders, comes from the *General Atlas of the Netherlands Indies*, in the second edition of 1870[57]. You see the relevant part now, in closer detail, as tab 16. Sipadan and Ligitan — it is Siparan here and you know why, because of the history of the name — are clearly shown as within the dominions of Sulu, or Solok as it is on the map, in a publication produced eight years before the Sulu grant. The editors of the Atlas, incidentally, were two well-informed officials of the Dutch Netherlands Government. They were not remote cartographers of world hand atlases.

(5) Immediately after the 1878 grant, the Dutch Government in response to questions in Parliament affirmed that it had "never disputed the authority of Spain over the dependencies of Sulu in the north-east portion" of Borneo[58]. This was subject to an express reservation of Dutch title along the coast to Batu Tinagat but no further. In 1879, for example, the Dutch Colonial Minister specified "Batoo Tinagat Rock" as the border[59]. The area in dispute was clearly shown on maps which made no reference to the proposed allocation line to the east,

---

[54] Reply of Indonesia, Vol. 2, Ann. 1.

[55] See, e.g., Memorial of Malaysia, Vol. 4, Ann. 76, discussed in Memorial of Malaysia, para. 5.7. For a list of names see Memorial of Malaysia, Vol. 4, Ann. 90.

[56] Counter-Memorial of Indonesia, para. 3.53.

[57] Memorial of Malaysia, Vol. 5, Map 3.

[58] Memorial of Malaysia, Vol. 3, Ann. 51, as cited in Memorial of Malaysia, para. 5.8.

[59] Memorial of Malaysia, Vol. 3, Ann. 40.

and of course no reference to the 4° 10' parallel, which made its first entry into the negotiations in 1889, ten years later. In 1888, the Dutch Government said that Batu Tinagat was *"le point extrême à l'est"*, "the extreme point at the east" of its claims[60]. And far from Bulungan retreating southwards down the coast, all the evidence is that it leapt forward to Batu Tinagat in 1879 as a pre-emptive move against the Sultan's grant. [End tab 16]

22. Mr. President, Members of the Court, this week Sir Arthur Watts expressly accepted that the evidence required for title to territory depends on the nature of the territory and its location, and that relatively slender evidence might be sufficient, if no claimant State could present any better evidence[61]. That is of course correct. But unfortunately when Indonesia's counsel came to consider the evidence of Sulu title they did not apply Sir Arthur's well-established rule. Naturally, to show that two small islands among dozens surrounding the Semporna Peninsula belonged in 1870 to a native Sultanate presents certain difficulties. But in fact we have produced a considerable body of contemporary evidence to that effect, and it is specific evidence, not just general assertion. I refer for example to Panglima Abu Sari — Panglima was a title awarded by a ruler — Panglima Abu Sari was appointed headman of Danawan in 1899 by the company. He was involved in disputes about turtle egg collection on Sipadan which the BNBC settled. He actually went to jail because he still held allegiance to the Sultan of Sulu; he was briefly jailed for that by the BNBC[62]. That shows the continuance of these links of allegiance well after the Sultan of Sulu had disappeared from the international scene. This evidence has to be compared, above all, with what Indonesia produces, which is nothing. The Dutch claims were co-extensive with the territory of Bulungan as set out in the contracts of 1850 and 1878. Indeed, as Indonesia actually says in its Reply, "The Netherlands admitted that the territory of Boelongan did not extend beyond the cape of Batu Tinagat."[63] No wonder Indonesia can produce no evidence of sovereignty over the islands. There is no evidence in the record that the Sultan of Bulungan exercised any control even over the island of Sebatik itself: the Dutch evidence, such as it is, tends to the contrary. The Dutch claim

---

[60] Memorial of Indonesia, Vol. 2, Ann. 37, and see Reply of Malaysia, para. 3.21.

[61] CR 2002/27, p. 24 (Sir Arthur Watts).

[62] See Reply of Indonesia, para. 2.7, footnote 11 and references.

[63] Reply of Indonesia, para. 5.14.

over Batu Tinagat was itself an ambit claim, it was the furthest they thought they could go up along the coast, and it was eventually withdrawn. The Dutch withdrew in a south-westerly direction after 1891 from Batu Tinagat to Broershoek: they did not advance 50 miles to the east towards Sulu!

23. Incidentally, I would note that Mr. Bundy's only attempt to show the absence of Sulu authority was by reference to a Note from the Philippines to Indonesia dated 5 April 2001[64]. It might be thought to be a late piece of evidence. The Court will remember the Philippines new, egg-shaped territorial claim, of which that letter was the precursor. It will recall Judge Kooijmans' blunt remark that the Philippines claim did not rise to the level of "plausibility"[65]. I hope next week Mr. Bundy will have the decency to refer to contemporary documents, that is to documents of the period in question, the nineteenth century. His only evidence dates from the twenty-first century, and is correspondingly implausible.

24. Thus when in 1878 the Sultan made his grant to the promoters of the British company, the position was clear enough. The Dutch accepted that the islands lying between Borneo and the Philippines were historically part of Sulu. The only exception to that were the inshore islands of Sebatik, Tarakan and Nanukan, and the small islets belonging thereto, which were claimed as part of Bulungan under the contracts of 1850 and 1878. All the rest was Sulu. And this reflected the social and political situation. The Sultan of Bulungan held no sway over the Sulu rulers and their Bajau subjects who inhabited and used the islands. The turtle egg collectors on Sipadan apparently owed their right to collect the eggs to a Sulu grant. What order there was in the region came from local officials such as Panglima Abu Sari, appointed by the Sultan of Sulu.

25. Counsel for Indonesia sought to minimize the significance of Sulu, treating it as nothing more than a petty sultanate, not capable of exercising authority over other islands[66]. Again that illustrates a lack of understanding of the history of the region. Sulu sustained opposition to Spain for many decades; it succumbed only in late 1878 after a determined Spanish effort. There is a

---

[64] CR 2002/27, p. 46 (Mr. Bundy).

[65] Judgment of 23 October 2001, declaration of Judge Kooijmans, paras. 9, 16

[66] CR 2002/27, pp. 40-43 (Professor Pellet).

substantial literature on Sulu in the eighteenth and nineteenth centuries, which is referred to in Malaysia's pleadings[67].

26. [Tab 17: Territorial extent of sultan's grant] Moreover, whatever uncertainties there may have been as to the extent of the 1878 grant, its effect on the offshore islands is quite clear. It covered the mainland down to the Sibuko River and the offshore islands within 9 nautical miles of that coast. It did not cover Kapalai, or the Ligitan group of islands — Danawan, Si Amil, Ligitan and Sipadan. All of these were beyond 9 nautical miles from the coast, as you can see from the graphic which is tab 17 in your folders.

The establishment of the BNBC

27. Mr. President, Members of the Court, I turn briefly to the establishment of the BNBC. The 1878 grant was made to the promoters of the BNBC, Overbeck and Dent. The reason was that they were setting up a British company which was constituted by a Royal Charter, issued by Queen Victoria in 1881[68]. The Charter incorporated the territorial extent of the 1878 grant. It gave rise to a Dutch protest[69], which as Professor Soons told you was based, not on any particular administration by the Dutch, but on a quite general and unfounded argument concerning the effect of the 1824 Treaty[70]: it had nothing to do with the offshore islands. The very fact of that protest demonstrates that the Dutch Government was aware of the extent of the Sulu grant. The consistent expression of the Dutch claim as extending no further east than Batu Tinagat has to be read in that context. There are no offshore islands within 9 nautical miles of Batu Tinagat, except the island of Sebatik. [End tab 17]

The Protocol of 1885

28. I turn next to the Madrid Protocol of 1885. Spain, as you know, did not accept the validity of the 1878 grant. The reason was it claimed to have conquered Sulu at the latest in 1851. The Netherlands recognized the Spanish claim, the Germans and the British did not. The

---

[67] See Memorial of Malaysia, Vol. 1, p. 8, note 7 and works there cited.

[68] Memorial of Malaysia, Vol. 2, Ann. 14.

[69] Memorial of Malaysia, Vol. 3, Ann. 41.

[70] CR 2002/27, p. 36 (Professor Soons).

disagreement was resolved in the Protocol of 1885, by which Great Britain and Germany recognized the Sultanate of Sulu as part of the Spanish Philippines, and Spain recognized the territory covered by the Sulu grant as part of British North Borneo[71]. Thus under the 1885 Protocol, Great Britain recognized as Spanish all islands which were part of the Sulu territory and which were beyond 9 nautical miles from the coast of Borneo. This included all the islands in the Ligitan group.

29. Indonesia has sought to minimize the impact of the 1885 Protocol, arguing that it only concerned the Sulu Archipelago in some narrow sense and not the islands off North Borneo. Although it has to be said that that argument hardly surfaced this week. In fact, the terms of the 1885 Protocol are explicit: you will find them as tab 20 in your folders.

30. Article II provided that the Archipelago included

> "all [I stress, *all*] the islands which are found between the western extremity of the island of Mindanao on the one side, and the continent of Borneo . . . on the other side, with the exception of those which are indicated in Article III [the continent of Borneo]".

Then Article III provided that:

> "The Spanish Government renounces, as far as regards the British Government [not as far as regards any other government] all claims of sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past [that was there because they could not agree on the status of Sulu] to the Sultan of Sulu (Jolo), and which comprise the neighbouring islands of Balambangan, Banguey, and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the company styled the 'British North Borneo Company'."

Thus while Spain did not accept the *validity* of the 1878 grant in 1885, it clearly recognized its *extent*. The reference to the 3-marine league zone of islands in Article III, combined with the reference in Article II, shows that the parties to the 1885 Protocol envisaged all the islands off the North Borneo coast down to the Sibuko River, and recognized that all the islands beyond 3 marine leagues continued to belong to Spain. That was precisely the conclusion drawn by the United States and Great Britain when they confronted the issue after 1903, as we will see tomorrow.

---

[71] Memorial of Malaysia, Vol. 2, Ann. 15.

There is no suggestion in the documentary record that the Dutch negotiators had any other view of the matter. The Netherlands never protested the 1885 Protocol or its confirmation in 1897[72].

The establishment of the British Protectorate

31. One other relevant event occurred before negotiations began between the Netherlands and Great Britain over their disputed claims "in Borneo". This was the formal proclamation by Britain of a protectorate over British North Borneo in 1888[73].

32. Only two points need to be made about the Protectorate Agreement and its associated Proclamation. First, it is clear that the extent of British North Borneo was the same under the Agreement and Proclamation as it was under the 1878 Grant and the 1885 Protocol. Secondly, the Protectorate was initially protested by the Netherlands, but then it was recognized in 1891. Again the protest shows that the Dutch Government was well aware of the situation. British North Borneo only extended to the islands within 9 miles of the coast. Thus the Dutch had notice four times of the situation and of that limitation: in the 1878 Grant, which caused them to occupy Batu Tinagat; in the Royal Charter, which they protested; in the 1885 Protocol, which was published; and in the 1888 Protectorate Agreement, which they protested. How could — this may be the fifteenth question — the 1891 Convention with Britain have allocated islands to the Netherlands, when there were no islands within 9 nautical miles of North Borneo which could have been affected by the allocation line, if one had existed?

Conclusion

33. Let me summarize the position as it stood at the time of the negotiations and conclusion of the 1891 agreement. I will do it in six points.

(1) The State of North Borneo under British protection claimed all the territory down to the Sibuko River and all islands within 9 nautical miles of the coast.

(2) That claim was expressly recognized by Spain in 1885.

---

[72] Memorial of Malaysia, Vol. 2, Ann. 18.

[73] Memorial of Malaysia, Vol. 2, Ann. 16.

(3) The claim was also recognized by the Netherlands in the 1891 Convention, *except* for the disputed area lying between the Sibuko River and Batu Tinagat. It was this disputed area which was divided by the 1891 Convention.

(4) The Ligitan group of islands fell outside the scope of the 1878 grant and the islands were clearly recognized by Britain in the 1885 Protocol as belonging to Spain.

(5) The Dutch Government was well aware of the limited scope offshore of the Sulu grant. It never claimed any islands to the east of Sebatik. It showed no interest in the Ligitan group whatever.

(6) Finally, even if — hypothetically — the 1891 Convention had drawn an allocation line 50 or 100 miles to the east of Sebatik, that line could not have affected the two islands because they did not belong to, and were not then claimed by, Great Britain as belonging to North Borneo.

34. Mr. President, Members of the Court, if these conclusions are correct — we have heard nothing to refute them —, they have a drastic effect on Indonesia's case. As I have shown, Indonesia's case stands and falls, in the first place, on the meaning of the 1891 Convention. But even if the 1891 Convention had the *meaning* attributed to it by Indonesia, it could not have had that legal *effect*. *Nemo dat quod non habet*. The islands were not Britain's to give in 1891. The Netherlands *could not have had* a treaty title to the islands arising from the 1891 Convention. And that in turn, as I have said, makes irrelevant everything Professor Pellet had to say on Tuesday about prescription. In fact, the evidence here would, if necessary, support a claim of prescription in favour of Great Britain against the Netherlands, given the absence of any expression of interest by the Netherlands in the islands after 1891, and their continued administration by the BNBC and its successors. But issues of prescription do not arise, because even Indonesia admits that the prior Dutch claim through Bulungan was uncertain, and because for the reasons I have explained there was no question of the Dutch acquiring a treaty title in 1891. Therefore the Dutch were no better placed after 1891 than they were before. Any claim they made had to be expressly made and sustained. It was neither made nor sustained, and the fact that it was not is fatal to Indonesia's case, irrespective of the 1891 Convention. What I have said is true even if — *quod non* — Indonesia's arguments about the 1891 Convention had any validity.

35. But, Mr. President, Members of the Court, tomorrow morning, Professor Cot will show you that they do not. Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Ceci met un terme à la séance d'aujourd'hui. La Cour reprendra l'examen de cette affaire demain à 10 heures du matin. La séance est levée.

L'audience est levée à 18 heures.

CR 2002/31

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2002

Public sitting

held on Friday 7 June 2002, at 10 a.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le vendredi 7 juin 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

---

[2]

Present:	**President**	**Guillaume**
	Judges	**Oda**
		Ranjeva
		Herczegh
		Fleischhauer
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne la parole au nom de la Malaisie au professeur Jean-Pierre Cot.

M. COT :

LA CONVENTION DU 20 JUIN 1891

Monsieur le président, Madame et Messieurs de la Cour, c'est un honneur et un plaisir que de paraître devant votre juridiction éminente pour défendre les intérêts de la Malaisie.

1. Monsieur le président, la convention de 1891 n'a jamais attribué la souveraineté territoriale sur Pulau Ligitan et Pulau Sipadan aux Pays-Bas et, par voie de succession, à l'Indonésie.

2. Telle est pourtant la thèse avancée par l'Indonésie dans le présent procès. Le titre territorial fourni par l'article IV de la convention apparaissait comme un titre alternatif, complémentaire, dans les négociations préalables à l'instance et dans le mémoire indonésien. Il est devenu progressivement titre principal, puis titre unique dans la réplique[1] et lors de la procédure orale. Titre unique par défaut, l'Indonésie ayant dû renoncer à prétendre à un titre antérieur, fondé sur la prétendue souveraineté du sultan de Bulungan sur les îles, comme l'a démontré mon collègue, le professeur Schrijver.

3. Suivant la thèse indonésienne — si je l'ai bien comprise —, l'article IV de la convention de 1891 aurait établi un périmètre d'attribution territoriale, courant le long du parallèle 4° 10', répartissant entre les deux signataires les îles se trouvant en mer de Célèbes et laissant aux Pays-Bas la souveraineté sur les îles de Pulau Ligitan et de Pulau Sipadan, situées au sud de cette ligne.

4. Nous démontrerons qu'il n'en est rien. La lecture que propose l'Indonésie de la convention de 1891 ne correspond pas à une interprétation de bonne foi du texte en application des règles de la convention de Vienne sur le droit des traités. Elle relève de l'imagination fertile et talentueuse des conseils indonésiens.

---

[1] Réplique de l'Indonésie, p. 15, par. 1.23.

5. Monsieur le président, Madame et Messieurs de la Cour, je conduirai cette démonstration en six temps. Dans un premier temps, j'évoquerai le cadre général du traité de 1891 (I). Je procéderai en second lieu à l'analyse du texte de la convention (II). Puis j'évoquerai brièvement la notion de périmètre d'attribution pour montrer qu'elle n'a pas été envisagée, encore moins retenue par les parties (III). J'aborderai en quatrième lieu la question des travaux préparatoires (IV). J'examinerai ensuite la procédure de ratification et la carte interne invoquée par l'Indonésie à l'appui de sa thèse (V). Enfin je conclurai mon propos en examinant les accords ultérieurs interprétatifs de la convention de 1891 (VI).

I. Le cadre général de la négociation du traité de 1891

6. Que la Cour se rassure, je n'ai pas l'intention de reprendre ici le détail des négociations entre les parties dans les années précédant la conclusion du traité. Nous avons décrit cette négociation dans nos écrits. Au demeurant, je constate l'accord des Parties sur les étapes de cette négociation même si – c'est évident — nous ne sommes pas d'accord sur les conclusions à en tirer.

7. La négociation qui retient notre attention ce matin s'inscrit dans le cadre du grand partage des empires coloniaux. Nous retrouvons dans ce dossier les noms des bâtisseurs de l'Empire colonial britannique : l'architecte en chef, bien entendu, lord Salisbury, premier ministre et ministre des affaires étrangères; mais encore, ses collaborateurs, sir Julian Pauncefote, sir Edouard Hertslet, sir Philip Currie, dont les noms reviennent à propos du partage des îles de la Sonde — nous y sommes —, mais encore de l'Afrique, des Antilles, de la Guyane.

8. S'agissant de Bornéo, j'attirerai l'attention de la Cour sur trois caractéristiques qui se dégagent de ce récit : les territoires à délimiter étaient mal connus, peu explorés; la préoccupation principale des parties avait trait à l'accès aux fleuves permettant d'explorer l'intérieur de l'île de Bornéo, puis d'en exploiter les richesses; enfin personne, à aucun moment, n'évoque la présence d'îles en haute mer, dont il s'agirait de préciser l'appartenance.

9. En 1891, le nord-est de l'île de Bornéo était mal connu, c'est un euphémisme que de le dire. La présence coloniale se limitait à quelques postes sur les côtes, de rares incursions à l'intérieur des terres. Les fleuves constituaient les seules voies de pénétration à l'époque — et

encore. En 1891, l'Amirauté britannique refuse à ses navires l'autorisation de remonter de plus de 20 milles les fleuves proches de la frontière en voie de détermination, de crainte de la malaria[2]. Les populations indigènes étaient réputées farouches, dangereuses. Ceci valait pour les populations installées sur terre ferme, mais aussi pour les pirates des mers que M. Schrijver a évoqués hier. La cartographie était approximative, l'exercice de la souveraineté territoriale nécessairement épisodique.

10. Cet état de fait se traduit par l'incertitude des ambitions territoriales nourries tant par les Pays-Bas que par la Grande-Bretagne. Les positions avancées lors des négociations varient grandement, parce qu'on ne sait pas au juste sur quoi l'on négocie[3]. Comme vous le verrez sur la carte où j'ai repris les positions de base des négociations; si je prends la première frontière — celle sans doute erronée de 1846 qui fut bientôt récupérée ensuite — et que je prends le point nord de la *Dutch claim*, nous voyons une différence de près de 150 km entre les différentes positions avancées par les uns et par les autres. On ne sait pas au juste sur quoi l'on négocie. Ceci vaut tant pour le territoire terrestre que pour les îles se trouvant au large de Bornéo. Ainsi l'Amirauté britannique, dans ses instructions de navigation, situe en 1890 Ligitan à la latitude de 4° 12' nord, soit nettement au nord du parallèle 4° 10'[4].

11. Aussi la préoccupation des négociateurs de la convention de 1891 est-elle de permettre l'exploration, puis l'exploitation rationnelle du territoire de Bornéo et de ses ressources. Comme dans le cas de beaucoup de régions mal connues et alors partagées entre les puissances coloniales — je songe notamment à l'Afrique —, les négociateurs attachent une importance particulière à l'accès aux fleuves et à la liberté de navigation. Cette préoccupation se comprend aisément dans le cas de Bornéo. La seule pénétration possible dans l'île se fait par les fleuves. Comme le précise la commission parlementaire néerlandaise saisie de la ratification du traité de 1891, *«The allocation of territory in the interior of Borneo is not actually possible at the present moment.»*, ajoutant que la délimitation, le moment venu, par coopération entre les parties ne devrait pas poser de problème[5].

---

[2] Mémoire de l'Indonésie, vol. 3, annexe 69.

[3] Dossier des juges, onglet 21.

[4] Contre-mémoire de la Malaisie, vol. 1.

[5] Mémoire de la Malaisie, annexe 52.

Le choix d'une frontière adossée à une ligne hydrographique, que ce soit le cours d'un fleuve ou la ligne de partage des eaux, courant jusqu'à la crête d'un massif visible, est plus «naturel», si je puis dire, moins aléatoire que d'autres lignes dans une telle situation d'incertitude[6].

12. L'objectif de la stabilité et de la finalité du règlement frontalier inspire sans doute les parties. Mais en faire la seule clef de lecture de la convention, comme nous y invite sir Arthur Watts[7], me paraît excessif. Les parties entretenaient d'excellentes relations politiques à l'époque. Conscientes de leur connaissance limitée du terrain, elles avaient mis en place la procédure de révision du traité par l'article V. Leur préoccupation principale restait l'accès aux fleuves, c'est-à-dire aux voies de pénétration dans la grande île.

Nos contradicteurs ont cherché à minimiser cet objectif de l'accès aux fleuves, formulé notamment par sir Edward Hertslet dans le cadre de la commission mixte. Mais la préoccupation était largement partagée par le partenaire néerlandais. En témoignent notamment le «Mémorandum explicatif n° 3» du Gouvernement néerlandais transmis au Parlement le 25 juillet 1891 avec la carte sur laquelle je reviendrai[8]; le rapport de la commission parlementaire chargée d'étudier le projet, rapport en date du 2 décembre 1891[9]; la réponse du Gouvernement néerlandais à ce rapport, signée notamment par le comte de Bylandt, principal négociateur du traité du côté néerlandais, réponse en date du 20 février 1892[10].

13. En revanche, les parties ne s'intéressaient guère aux îles lointaines situées soit en mer de Chine, soit en mer de Célèbes. Il s'agit d'établir une frontière terrestre, non de répartir des îles se trouvant en pleine mer. Au cours d'une négociation qui s'étend sur plus d'une décennie, aucune mention d'îles se trouvant au large des côtes et dont il faudrait déterminer la souveraineté. Tout au plus envisage-t-on rapidement les îlots adjacents aux côtes, se trouvant à proximité immédiate des îles de Tarakan, Nanoekan et Sebatik[11]. Pour reprendre l'expression du tribunal arbitral

---

[6] Contre-mémoire de la Malaisie, vol. 1, p. 18, par. 2.22.

[7] Watts, CR 2002/27, p. 58-59, par. 12; CR 2002/28, p. 14, par. 23-24; p. 26, par. 79.

[8] Mémoire de la Malaisie, vol. 3, annexe 51.

[9] Mémoire de la Malaisie, vol. 3, annexe 52.

[10] Mémoire de la Malaisie, vol. 3, annexe 53.

[11] Contre-mémoire de la Malaisie, vol. 1, p. 12-13, par. 2.8–2.11.

Guinée/Guinée-Bissau, «il semble que cela n'ait visé que les îles côtiè
indubitablement situées dans les eaux territoriales»[12].

14. On constate la même indifférence à d'éventuelles îles sises au large da
la commission mixte préparatoire. Les procès-verbaux de la commission n'é
moment des îles situées au large. Lors des débats longs et approfondis consacrés
de La Haye à la ratification de la convention de 1891, aucune des interv
Gouvernement néerlandais, soit des députés à la Chambre haute ou à la Chambre
l'existence de Sipadan, de Ligitan bien sûr mais d'aucune autre île au large ou
préciser l'appartenance. Ce silence, Monsieur le président, Madame et Messi
s'explique. Il n'y avait pas d'îles à distribuer, à partager entre les parties, ni à l'o
Tandjong Datoe, en mer de Chine, ni à l'est, au large de Sebatik, en mer de Cé
réplique de nos contradicteurs : «*neither Indonesia nor Malaysia has adduced a*
Sipadan and Ligitan were specifically mentioned by either side during the neg
1891 Convention. There was, rather, a general uncertainty about territorial posses

Cette constatation, Monsieur le président, est confirmée par l'examen
convention.

II. Le texte de la Convention du 20 juin 1891

15. L'article IV de la convention dispose, je m'excuse de le citer à nouveau
éléments de base de notre affaire, et je le cite complètement :

> «*From 4°10' latitude on the east coast the boundary line shall be*
> *along that parallel, across the island of Sebattik; that portion of the island*
> *the north of that parallel shall belong unreservedly to the British Nor*
> *Company, and the portion south of that parallel to the Netherlands*[14]».

16. Monsieur le président, le sens naturel et ordinaire du *texte* de la disposit
de doute. La frontière qui a été décrite vers l'intérieur dans les articles précéden
d'arrivée de l'article III sur la côte orientale de Bornéo. Elle suit le parallèle 4°1

---

[12] Sentence du 14 février 1985, par. 61.

[13] Réplique de l'Indonésie, vol. 1, p. 10, par. 1.7.

[14] Dossier des juges, onglets 21 et 22.

chenal qui sépare Bornéo de l'île de Sebatik, puis l'île de Sebatik elle-même jusqu'à sa côte orientale. Rien n'indique dans le texte que la ligne doive être prolongée en mer.

17. Sur la rédaction de cette disposition, mon éminent collègue et professeur Lauterpacht a fait quelques observations auxquelles je renvoie respectueusement la Cour. J'ajouterai pour ma part les éléments suivants.

18. La préposition *«across»* indique la traversée de l'île de Sebatik, d'un côté à l'autre. C'est ainsi que la préposition est définie par les principaux dictionnaires anglais. Je cite le grand *Oxford English Dictionary* : *«From side to side of; quite through, over, in any direction except lengthwise, across the country; straight through two points ...»*[15].

19. On trouvera la même notion, *«from one side to the opposite side of»*, dans les dictionnaires Webster[16], Collins[17], ainsi que dans les principales grammaires anglaises[18]. Pour prolonger la ligne au-delà, comme le souhaite l'Indonésie, il eût fallut que les parties ajoutassent la préposition *«beyond»*.

20. Le texte néerlandais confirme l'interprétation : *«vervolgd worden langs die parallel* over *het eiland Sebittik»*. Excusez-moi pour cette prononciation, je ne maîtrise pas d'avantage cette belle langue que mon collègue Alain Pellet. Les dictionnaires néerlandais précisent qu'il s'agit de parcourir la surface, d'un point à l'autre[19]. Et là encore, si l'intention avait été de prolonger la ligne, les rédacteurs auraient ajouté la préposition *«voorbij»*, c'est-à-dire «au-delà».

21. Surtout, l'interprétation que propose l'Indonésie oblitère la seconde partie de l'article, qui en précis[illegible] sens : la division de l'île de Sebatik en deux secteurs par le parallèle 4°10', le secteur septentrional appartenant «sans réserve», notez les mots, à la British North Borneo Company, la partie méridionale appartenant de même, sans réserve, aux Pays-Bas. C'est un

---

[15] Clarendon Press, Oxford, vol. I, 1989, p. 122 .

[16] Merriam Webster, *Encyclopaedia Britannica Inc.*, vol. I, 186, p. 20.

[17] Collins, London & Glasgow, 1987, p. 13.

[18] *Longman English Grammar*, Longman, London & New York, 1991, p. 328; Michel Swan, *Practical English Usage*, OUP, 1992, p. 7.

[19] *Woordenboek der Nederlandsche taal*, vol. XI (ooit-ozon), The Hague/Leiden : Nijhoff/Sijthoff, 1910, p. 1591 : *«F. Het begrip : boven langs de oppervlakte gaande breekt zich uit van de eene zijde van iets naar de andere, met het doel aan den overkant te komen»*. Voir aussi Van Dale - *Grand Dictionnaire de la Langue Néerlandaise*, vol. II (j-r), 13ᵉ éd., 1999, p. 2421-2422.

point-virgule qui sépare les deux membres de phrase. Celles-ci sont indissociables et s'éclairent mutuellement. Il s'agit de partager l'île de Sebatik, c'est tout.

22. Le *contexte* confirme notre interprétation. Il n'est nulle part question d'un périmètre d'attribution prolongeant en mer la frontière terrestre.

23. L'absence de toute référence, que ce soit dans l'article III ou dans l'article IV, aux îles se trouvant au large de Bornéo comme celle de toute référence à une quelconque délimitation maritime vient renforcer la conclusion. A part l'île de Sebatik, on ne trouve pas la moindre mention dans le texte de la convention d'un territoire autre que celui de la masse terrestre de Bornéo, que ce soit à l'ouest, au large de Tanjoug-Datoe ou à l'est, au large de Sebatik. Comme l'a fait observer le tribunal arbitral dans l'affaire *Guinée/Guinée-Bissau* :

> «Le Tribunal considère que l'usage fréquent des termes *possessions* et *territoire* dans le texte de la convention prouve que celle-ci avait bien pour objet les possessions coloniales de la France et du Portugal en Afrique de l'Ouest, mais que l'absence totale des mots *eaux*, *mer*, *maritime* ou *mer territoriale* constitue un indice sérieux de ce qu'il était essentiellement question de possessions terrestres.»[20]

Il n'est pas question dans la convention de prolonger à l'ouest la frontière terrestre en mer de Chine, pas plus qu'il n'est question de la prolonger à l'est en mer de Célèbes.

24. *L'objet et le but* de la convention résultent en particulier du préambule. Les souverains des deux Parties y précisent qu'elles sont : «*desirous of defining the boundaries between the Netherland* possessions in the Island *of Borneo and the States* in that island *which are under British protection* . . . ».

25. L'article premier de la convention insiste : «*The boundary between the Netherlands possessions in Borneo and those of the British-protected States* in the same island . . . ».

26. Il s'agit de délimiter une frontière sur le territoire de l'île de Bornéo elle-même, mais non de fixer une délimitation maritime ou de tracer un périmètre d'attribution vers le large.

27. Mais à ce stade de la démonstration, il peut être utile, Monsieur le président, de présenter quelques remarques au sujet de la technique juridique qui aurait été mise en œuvre, aux dires de nos adversaires, par l'article IV de la convention de 1891 : la technique des périmètres d'attribution.

---

[20] Sentence du 14 février 1985. RGDIP, 1985, p. 484; 77 *ILR*, p. 635. Cf. par. 56.

III. La technique des périmètres d'attribution

28. La technique des périmètres d'attribution — que l'on peut faire remonter à la bulle *inter caetera* du pape Alexandre VI — est une technique mise en œuvre fréquemment au XIX^e et au début du XX^e siècles. Elle correspond à une période d'expansion des empires coloniaux et de partage d'un monde encore mal connu. Elle s'apparente, par certains aspects, à la technique de délimitation des zones d'influence qui lui est contemporaine, délimitation au moyen de frontières provisoires qu'il appartenait aux parties à l'accord de consolider par l'occupation effective.

29. Curieusement, la doctrine n'a pas tourné son attention vers la notion des périmètres d'attribution, à notre connaissance du moins. Quelques pages dans Jones[21], dans Caflisch[22], une sentence arbitrale, que j'ai déjà citée. D'où l'incertitude sur l'appellation même de cette ligne distributive. Pour ma part, je reprendrai la terminologie employée par le tribunal arbitral dans l'affaire *Guinée/Guinée-Bissau*[23]. Et, j'appellerai périmètre d'attribution la ligne théorique tracée en haute mer dans le cadre d'une convention et permettant de répartir entre les parties la souveraineté sur les îles se trouvant dans le secteur en cause[24]. J'en retiendrai deux traits caractéristiques pour la présente affaire.

1. *Le périmètre d'attribution n'est pas une délimitation maritime*

30. Boggs, dans son article sur la délimitation des espaces maritimes, note fort justement :

> *«Most lines in water areas which are defined in treaties are not boundaries between waters under the jurisdiction between the contracting parties, but a cartographic device to simplify the description of the land areas involved.»*[25]

31. Il ne s'agit en aucune manière d'une délimitation maritime, c'est-à-dire d'une frontière entre espaces maritimes soumis à la souveraineté respective des Etats parties au traité. Il s'agit simplement d'une manière commode d'attribuer la souveraineté sur des territoires terrestres, des îles, de décrire les territoires dépendant d'une souveraineté et de l'autre. C'est une astuce cartographique *«a cartographical device»*, rien de plus. Il ne s'agit pas de séparer des souverainetés adjacentes, comme dans le cas d'une véritable frontière, qu'elle concerne des espaces

---

[21] S. B. Jones. *Boundary-Making*. Washington, 1945, p. 149-150.

[22] L. Caflisch, «Essai d'une typologie des frontières», *Relations internationales*, n° 63, p. 274-277.

[23] Sentence du 14 février 1985. *RGDIP*, 1985, p. 484; 77 *ILR*, p. 635.

[24] *Ibid.*, par. 47.

[25] «Delimitation of Seaward Areas under National Jurisdiction», *AJIL*, 1951, vol. 45, p. 240, note 2.

terrestres ou maritimes. Le périmètre d'attribution est en effet tracé pour bonne part en haute mer. Il est inscrit dans un espace qui ne relève d'aucune souveraineté nationale.

32. Le régime juridique d'une telle ligne n'est donc assimilable en aucune manière à celui d'une frontière. Sa fonction est strictement limitée à la description des souverainetés en question et à la distribution des îles concernées. Elle est indépendante des notions d'adjacence ou de coexistence de souverainetés limitrophes. Elle ne saurait en aucune manière être considérée comme une frontière, comme la prolongation en mer de la frontière terrestre.

33. Le tribunal arbitral pour la *Délimitation de la frontière maritime Guinée/Guinée Bissau* précise la fonction limitée du périmètre d'attribution en les termes suivants :

> «47. Il n'est pas contesté par les Parties que la disposition à l'examen fait ce que son texte indique avec la plus grande clarté : elle vise à désigner quelles îles au large des côtes de la Guinée «appartiendront» en pleine souveraineté au Portugal. Elle détermine à cette fin un *périmètre* à l'intérieur duquel toutes les îles qu'il enferme sont déclarées portugaises. Mais les Parties sont en désaccord sur le point de savoir si le périmètre ainsi défini remplit également une autre fonction, celle de séparer les îles et les eaux portugaises des îles et des eaux françaises, c'est-à-dire d'établir une frontière maritime générale.»[26]

34. Et l'on sait qu'au terme d'une analyse approfondie de la convention franco-portugaise de 1886, le tribunal arbitral a estimé que celle-ci n'avait établi aucune frontière maritime[27].

35. Dans l'affaire de la *Délimitation Erythrée/Yémen (première phase)*, le tribunal arbitral a pareillement noté que le périmètre d'attribution ne se confondait pas avec la délimitation maritime, même si les deux délimitations n'étaient pas sans rapport entre elles[28].

36. Or la convention de 1891 est un traité-frontière, une *«Boundary Convention»*, pour reprendre son titre. Elle ne vise que les frontières — *boundary* —,et ceci dès la première phrase du préambule. Il n'est question de rien d'autre. Les parties ne manifestent pas la volonté de tracer une quelconque sphère d'influence sur les espaces terrestres ou maritimes, mais bien de fixer une frontière terrestre séparant leurs souverainetés respectives. Ce n'est pas le même exercice que la distribution d'îles au large.

---

[26] *RSA*, vol. XIX, par. 47.

[27] *Ibid.*, par. 67.

[28] *ILR*, n° 114, p. 37, par. 111-112.

37. L'Indonésie avance qu'une même ligne peut fort bien remplir deux fonctions[29]. Elle se réfère à l'arrêt rendu par la Chambre de la Cour dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*. Mais dans cette affaire, qui concernait une frontière terrestre, la Chambre a examiné les fonctions attribuées simultanément et sur un même secteur à la ligne frontière entre le Burkina Faso et le Mali. Elle a constaté qu'un même instrument pouvait être pertinent pour résoudre un conflit de délimitation et un conflit d'attribution de territoire. Elle a précisé : «En fait, dans la très grande majorité des cas, comme en l'espèce, la distinction ainsi schématisée ne se résout pas ultimement en un contraste de genres mais exprime bien plutôt une différence de degré ... dans l'opération considérée.»[30]

38. Or, dans le cas présent, il s'agit de tout autre chose : la prolongation d'une ligne frontière par un périmètre d'attribution, c'est-à-dire par une ligne de nature différente et assurant une fonction différente. Ce n'est plus une «différence de degré», mais bien un «contraste de genres».

39. Ajoutons que le périmètre d'attribution n'est jamais un périmètre hypothétique. Il ne s'agit pas de délimiter les espaces *in abstracto*, mais de préciser l'attribution souveraine de territoires insulaires définis, situés. Les exemples de périmètres d'attribution relevés au XIX^e et au XX^e siècles concernent tous la répartition d'îles localisées, identifiées. Il n'est pas d'exemple, à notre connaissance, de périmètre d'attribution abstraite, tracé à tout hasard, «au cas où», en ignorant s'il existe bien des territoires à partager, des îlots à distribuer.

40. En l'espèce, la Grande-Bretagne et les Pays-Bas, parties à la négociation ignoraient, lors des réunions de la commission mixte chargée de rédiger le projet, sinon l'existence des îles de Sipadan et de Ligitan, du moins leur localisation précise. L'Indonésie le reconnaît volontiers. Il n'y avait aucune raison particulière de tirer une ligne représentant un périmètre d'attribution sans très bien savoir à quoi cela pourrait servir.

---

[29] Réplique de l'Indonésie, par. 1.18.

[30] *C.I.J. Recueil 1986*, p. 563, par. 17.

2. Surtout, *le périmètre d'attribution est toujours précisé explicitement dans le traité de référence*

41. Il n'existe pas, à ma connaissance, de périmètre d'attribution implicite. Tous les exemples relevés — *et notamment tous les exemples relevés par l'Indonésie dans ses écrits et dans ses plaidoiries orales* — reposent sur une mention *explicite* dans le traité de délimitation.

42. Je prie la Cour d'excuser la litanie qui va suivre mais elle me paraît nécessaire à la démonstration.

43. Le traité de Paris du 3 septembre 1783, conclu entre la Grande-Bretagne et les Etats-Unis et mettant fin à la guerre d'indépendance, prévoit *explicitement* un périmètre d'attribution dans la baie de Passamaquody[31]. Il attribue ainsi aux Etats-Unis les îles se trouvant dans un rayon de 20 milles à l'est du périmètre d'attribution.

44. La convention franco-britannique du 28 juin 1882 attribue *explicitement* à la Grande-Bretagne les îles situées au sud du périmètre d'attribution entre le Sierra Leone et la Guinée et à la France les îles se trouvant au nord de cette île[32].

45. Le dernier alinéa de l'article I de la convention franco-portugaise du 12 mai 1886 dispose *explicitement* :

> «Appartiendront au Portugal toutes les îles comprises entre le méridien du cap Roxo, la côte et la limite sud formée par une ligne qui suivra le thalweg de la rivière Cajet et se dirigera ensuite au sud-ouest à travers la passe des Pilotes pour gagner le 10° 40' latitude nord avec lequel elle se confondra jusqu'au méridien du cap Roxo.»[33]

46. La convention conclue entre la France et la Chine le 26 juin 1887, dite convention Constans, dispose *explicitement* en son article 2, alinéa 2, que les îles situées à l'est du méridien de Paris 105° 43' de longitude est sont attribuées à la Chine, les îles se trouvant à l'ouest de ce méridien revenant à l'Annam[34].

A la convention est annexée une carte, actuellement projetée sur l'écran[35] et que vous trouverez à la cote 24 de votre dossier, qui illustre la volonté des parties telle que formulée dans le texte de l'accord.

---

[31] Article II. Martens, *Recueil des traités*, t. III, p. 553-559.

[32] Article II. *British and Foreign State Papers*, vol. 77 (1885-1886), p. 1007-1012.

[33] Article 1er, par. 5. *RSA*, vol. XIX, p. 151.

[34] De Clercq, *Recueil des traités de la France*, vol. 17, 1886-1887, p. 387.

[35] Dossier des juges, onglet 24.

47. La convention de Pékin du 9 juin 1898, conclue entre la Chine et la Grande-Bretagne et relative à Hong Kong prévoit *explicitement* un périmètre d'attribution afin de distribuer les îles avoisinantes entre les parties[36].

48. Le traité de Paris du 10 décembre 1898 entre l'Espagne et les Etats-Unis décide *explicitement* de céder aux Etats-Unis les Philippines comprenant les îles :

«... lying within the following line :

> *A line running from east to west along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi... »*[37]

49. La convention du 2 janvier 1930 entre la Grande-Bretagne et les Etats-Unis précise *explicitement* que :

> *«It is hereby agreed and declared that the line separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand shall be and is here established as follows : ...»*[38]

50. Monsieur le président, j'aurais pu multiplier les exemples. Je vous en fais grâce. Vous remarquerez cependant, pour utiliser les termes employés par le tribunal arbitral dans l'affaire *Guinée/Guinée-Bissau*, que, dans le traité franco-portugais en l'espèce, comme dans tous les exemples cités, la disposition à l'examen fait ce que son texte indique avec la plus grande clarté : elle vise à désigner quelles îles au large des côtes de Guinée «appartiendront» en pleine souveraineté au Portugal[39].

51. Par contre, dans le cas de la convention de 1891, il n'y a pas un mot, pas une allusion, à propos d'un périmètre d'attribution qui distribuerait la souveraineté entre les parties sur les îles situées au large. Il n'y a aucune carte annexée à la convention. La clause d'attribution de souveraineté fait défaut dans le cas présent. Rien, je dis bien rien, dans le texte du traité, ne permet d'y lire la décision d'instituer un périmètre d'attribution.

52. Qu'on ne plaide pas l'imprécision, l'ignorance, l'oubli, l'approximation des négociateurs. Je note que la plupart des exemples cités sont à peu près contemporains de la

---

[36] U.S. Department of State, China – Hong Kong Boundary, n° 13, 5 April 1962.

[37] Article III. Martens, *NRG*, 2e série, vol. 32, p. 74.

[38] Article III. SDN, *Recueil des traités*, vol. 137, p. 299-303.

[39] Sentence, p. 29, par. 47.

conclusion de la convention de 1891. Certains de ceux que j'ai cités concernent l'Asie du Sud-Est et la mer de Chine méridionale. Certains intéressent directement l'une et l'autre partie. La Grande-Bretagne et les Pays-Bas connaissaient donc parfaitement cette technique de distribution de la souveraineté territoriale. Elles connaissaient parfaitement la technique des périmètres d'attribution. Si elles le souhaitaient, il leur appartenait d'inclure dans la convention du 20 juin 1891 une disposition à cet effet. Elles ne l'ont pas fait.

53. J'ajoute — et je souligne — que nos savants contradicteurs sont en peine de citer *un seul exemple* de périmètre d'attribution implicite. Les périmètres d'attribution ne sauraient être présumés en cas de silence des textes. On peut transposer mot pour mot au cas des périmètres d'attribution la conclusion que le tribunal arbitral avait tirée le 14 avril 1985 du silence de la convention franco-portugaise en ce qui concerne la frontière maritime : «Dans ce silence des textes, il est fortement à présumer que les négociateurs n'ont jamais envisagé autre chose que des frontières terrestres.»[40]

54. Pour conclure sur la mise en œuvre des moyens principaux d'interprétation énoncés par la convention de Vienne en son article 31, constatons, Monsieur le président, que le texte de l'article IV de la convention du 20 juin 1891 est un texte clair. La frontière délimitée par la convention traverse l'île de Sebatik de part en part suivant le parallèle 4° 10' et s'arrête sur la côte orientale de l'île. Rien ne permet de prolonger d'une manière ou d'une autre la frontière en mer, moins encore de transformer cette ligne en périmètre d'attribution d'îles se trouvant à 50 milles de distance. Les parties auraient pu en décider autrement. Encore fallait-il qu'elles le disent expressément. Elles ne l'ont pas fait.

IV. Les travaux préparatoires

55. Le recours aux travaux préparatoires est légitime lorsque le sens du texte n'est pas clair. Je crois avoir montré que ce n'est pas le cas ici. Mais je réponds bien volontiers aux arguments de nos distingués contradicteurs.

56. Je rappelle cependant que les travaux préparatoires ne sont retenus que dans la mesure où ils éclairent l'accord intervenu entre les parties. Les prises de position unilatérales, les positions

---

[40] Sentence, p. 179, par. 79.

exprimées par une partie au cours de la négociation, ou à l'issue de celle-ci, n'ont pas à être retenues à ce titre. Elles apportent sans doute une indication sur le contexte général. Mais il ne s'agit pas de travaux préparatoires *stricto sensu.*

57. C'est au bénéfice de ces observations que j'évoquerai un certain nombre d'éléments du dossier avancés par la partie adverse.

58. Et d'abord *La correspondance diplomatique et les travaux de la commission mixte.* Les travaux préparatoires, au sens propre du terme, sont révélateurs. Ils concernent exclusivement la frontière terrestre. Que ce soit dans la correspondance diplomatique ou dans les procès-verbaux relatant les travaux de la commission mixte, on ne trouve pas une ligne évoquant, soit la frontière maritime, soit l'attribution d'îles en haute mer. Il n'est évidemment pas question de périmètre d'attribution dessiné à tout hasard.

59. Les îles côtières furent évoquées brièvement par un membre de la délégation néerlandaise, M. Elias, lors des travaux de la commission mixte[41]. Il précise : «Sibbitich (Sebatik), Nanoekan et Tarakkan», les trois îles jouxtant Bornéo dans le secteur. La mention est intéressante par ce qu'elle ne comprend pas. Pour M. Elias, il n'est pas question d'envisager la souveraineté sur d'autres îles, même hypothétiques, à découvrir dans l'avenir. Il n'est pas question de tracer, fût-ce à titre de précaution, un quelconque périmètre d'attribution.

60. Autre indication intéressante pour notre affaire, la limite orientale des revendications néerlandaises. La négociation porte surtout sur le point de départ, la côte orientale de Bornéo, de la frontière vers l'intérieur. Les thèses des parties s'opposent et varient dans le temps entre la rivière Atas (3° 10') et Batoe Tinagat, points distants d'environ 150 kilomètres. C'est Broershoek et, plus précisément, le point d'intersection du parallèle 4° 10' avec la côte orientale de Bornéo, qui sera retenu au terme d'une négociation assez longue et serrée.

61. En revanche, il n'y a pas de discussion sur la limite orientale des prétentions néerlandaises. Elle est fixée dès le début et elle ne varie plus : Batoe Tinagat. Le comte de Bylandt en fait le constat dès le 22 décembre dans une note à lord Salisbury rédigé dans un français particulièrement élégant et je vous y renvoie dans les annexes de la Malaisie :

---

[41] Mémoire de la Malaisie, vol. 3, annexe MM 45.

> «La notice que j'ai l'honneur de remettre ci-après à votre Excellence contient un ensemble de faits qui permettent de considérer comme fort probable que la rivière désignée dans les concessions sous le nom de «Siboeboe» *est située à l'est de Batoe Tinagat et par conséquent en dehors du territoire Néerlandais*. En ce cas toute cette controverse tomberait d'elle-même; elle n'aurait en réalité jamais existé.»[42]

62. La précision est reprise par Bylandt le 22 décembre 1888 — il parle de limite extrême à l'est[43] —, puis par la délégation néerlandaise à la commission mixte le 19 juillet 1889[44] et lors du débat de ratification, le ministre constate que cette revendication extrême, Batoe Tinagat, repose sur des fondements peu solides, ce que constatent nos contradicteurs[45].

63. Mais même si Batoe Tinagat constitue l'avancée extrême vers l'est des prétentions néerlandaises, on ne voit pas à ce moment là au nom de quelle logique les Pays-Bas auraient cherché à annexer d'éventuels îlots se trouvant à plus de 50 milles marins à l'est du cap Tinagat. Et si cela avait été à titre de compensation territoriale pour avoir descendu du nord vers Sebatik, dans ce cas-là, le ministre mis en difficulté dans le débat parlementaire n'aurait pas manqué de s'en prévaloir en disant «c'est vrai nous avons cédé Batoe Tinagat mais en revanche nous nous sommes étendu vers l'est et vers les îles au large de la mer de Célèbes. Pas un mot dans le débat parlementaire sur une telle hypothèse.

64. Permettez-moi, Monsieur le président, maintenant et à ce stade-ci de tenter ici une opération de démystification. Nos contradicteurs ont en effet réussi un superbe tour de prestidigitation. J'avoue que je ne connaissais pas les talents d'illusionniste du professeur Alain Pellet. Harry Potter s'est invité à votre prétoire !

65. De quoi s'agit-il ? Le professeur Pellet nous a sorti du chapeau une proposition britannique, incluse dans le dossier indonésien des juges sous la cote 31[46]. On nous a expliqué qu'il s'agissait de la proposition initiale britannique, il est même indiqué la proposition britannique au début des négociations, nous laissant entendre qu'elle avait été soumise par la Grande-Bretagne à son partenaire lors des négociations de la commission mixte, du 16 au 27 juillet 1889. M. Pellet

---

[42] Mémoire de l'Indonésie, vol. 2, annexe 31.

[43] Mémoire de l'Indonésie, vol. 2, annexe 37.

[44] Mémoire de la Malaisie, vol. 3, annexe 45.

[45] Mémoire de l'Indonésie, vol. 1, p. 73, par. 5.23.

[46] Dossier des juges, onglet 31.

ajoute que la carte de base de cette proposition a été annotée et utilisée par la délégation britannique durant les discussions de la commission mixte[47].

66. Mais, Monsieur le président, tout ceci est une illusion. A partir d'une proposition britannique bien réelle, celle de faire passer la frontière entre les îles de Sebatik et de Nanoekan, on a suscité un mirage, celui de la prolongation en haute mer d'une ligne parallèle. Tout ceci ne repose sur aucun fondement, aucun élément de preuve. Le document interne au Foreign Office ? Ce sont des notes manuscrites anonymes et sans date, de l'aveu même de l'Indonésie[48]. Ces soi-disant instructions ont été superbement ignorées par les hauts fonctionnaires britanniques et d'abord par sir Edward Hertslet lui-même, puisqu'il participait aux travaux de la commission mixte. Or, je ne trouve pas l'ombre d'une trace d'une telle proposition dans le procès-verbal des trois séances[49] de la commission mixte que nous avons joint à votre dossier pour que vous puissiez vérifier mes dires.

67. Les cartes ? Des croquis surchargés par les mêmes fonctionnaires, sans doute, mais qui n'ont jamais été soumis à leurs interlocuteurs néerlandais, si j'en crois le même procès-verbal de la commission mixte. Oui, des cartes ont été produites par la partie britannique, lors de la première session de la commission mixte. Mais ces cartes ne sont pas des croquis surchargés dont parle le professeur Pellet ? Ces croquis surchargés ont été classés au Foreign Office dans le dossier des cartes de l'affaire, mais il n'en est pas fait le moindre état dans les procès-verbaux des travaux de la commission mixte. Les cartes produites par les délégués britanniques à la première séance de la commission mixte sont des cartes d'origine néerlandaise au demeurant formellement récusées par le comte de Bylandt[50] et dès lors, il n'en a plus été question.

68. Alors *exit* la mystérieuse proposition ! *Exit* les croquis surchargés ! Je salue le beau tour de passe-passe, j'applaudis ! Bravo l'artiste ! Pour le reste, je prie la Cour de lire avec l'attention qu'elles méritent les 25 pages de procès-verbaux de la commission mixte[51] que vous trouverez dans votre dossier sous la cote 34.

---

[47] CR 2002/27, p. 53, par. 52.

[48] Mémoire de l'Indonésie, vol. 2, annexe 56.

[49] Dossier des juges, onglet 34.

[50] Mémoire de la Malaisie, vol. 3, annexe 44.

[51] Mémoire de la Malaisie, vol. 3, annexes 44, 45 et 46.

69. Ce procès-verbal de la commission mixte, complété par la correspondance diplomatique ultérieure, permet de reconstituer le cheminement de la proposition finalement retenue par l'article IV de la convention. L'accord s'étant fait en commission mixte sur le point de Broershoek, situé sur la côte est de Bornéo, en face de l'île de Sebatik, le désaccord subsiste à l'issue des trois sessions de la commission mixte sur le problème de l'accès aux fleuves. Le conseil d'administration de la BNBC refuse de laisser l'île de Sebatik aux Pays-Bas. Il suggère le 22 juillet 1890, à titre de transaction, le partage de l'île par une ligne tracée de Broershoek au East Corner de Sebatik, le long du parallèle 4° 10' nord[52]. Le Foreign Office reprend la proposition du BNBC, proposition de division de l'île de Sebatik, mais en la modifiant légèrement en suggérant que les Pays-Bas donnent à bail la moitié septentrionale de l'île[53]. Le 2 février 1891, le comte de Bylandt refuse la formule du bail, mais accepte de céder — et c'est ainsi que s'expliquent les mots «en cause» — «sans restriction», dit-il, la partie de l'île de Sebatik se trouvant au nord du parallèle 4° 10'[54]. C'est cette formule qui est reprise dans l'article IV de la convention : *«that portion of the island situated to the north of that parallel shall belong* unreservedly *to the British North Borneo Company, and the portion south of that parallel to the Netherlands»*. L'adjectif *«unreservedly»* qui peut paraître un peu singulier à la première lecture du traité s'explique ainsi par le processus de négociations de refus de la proposition de bail sur la partie septentrionale de l'île.

70. Il s'agissait donc bien dans l'esprit des négociateurs de la convention, en rédigeant l'article IV, de partager l'île de Sebatik, un point, c'est tout. Il ne s'agit pas ici, comme le suggère sir Arthur Watts, d'une proposition subsidiaire[55], mais du cœur même de la disposition arrêtée par les parties dans l'article IV. C'est tout le problème de l'accès au fleuve au nord et au sud de l'île qui est ainsi posé. Ajoutons qu'il n'a jamais été question, à aucun moment, dans les phases finales de la négociation de prolonger en haute mer et à l'est de Sebatik, la ligne frontière, moins encore de la transformer en un périmètre d'attribution.

---

[52] Mémoire de la Malaisie, vol. 3, annexe 48.

[53] Mémoire de la Malaisie, vol. 3, annexe 49.

[54] Mémoire de la Malaisie, vol. 3, annexe 50.

[55] Watts, CR 2002/28, p. 17, par. 38.

71. Monsieur le président, j'en viens maintenant et à mon tour aux activités maritimes dans le secteur. Le professeur Soons a pour la marine royale néerlandaise une tendresse évidente et légitime, cette marine royale illustrée par la grande tradition de l'amiral de Ruyter, celui dont le pavillon faisait trembler les marins de la France et de Louis XIV. Le professeur Soons ne nous a pas épargné le moindre mouillage ou la plus petite annotation marginale sur le journal de bord des bâtiments de Sa Majesté. Au cours d'un exposé exhaustif, il nous a détaillé lundi matin les activités de l'*Admiraal Van Kinsbergen*[56]; lundi après-midi il a évoqué la silhouette du *Macasser*, la croisade du *Koetei*, puis plus longuement, le *Lynx* et son petit hydravion de reconnaissance avec ses photographies tout à fait réussies et émouvantes[57].

72. Exposé exhaustif ? Pas tout à fait exhaustif, Monsieur le président. Il a en effet oublié de nous parler du HNLMS *Banda*. Le *Banda* est pourtant un navire de Sa Majesté la Reine des Pays-Bas, placé sous le commandement du commandant van Oyen. Il participe à une mission officielle du 20 mai au 21 juin 1891[58]. Il a pour mandat, avec ses collègues de la marine royale britannique de reconnaître la frontière en cours de négociation (nous sommes à la veille de la signature de la convention) et de placer des bornes à l'intersection du parallèle 4° 10' avec les côtes est et ouest de l'île de Sebatik. Il me semble, Monsieur le professeur, que cela méritait une petite mention, l'affaire me paraît au moins aussi pertinente pour notre cause que le journal de bord de l'*Admiraal Van Kinsbergen* ou que les aventures du *Lynx*.

73. La reconnaissance du secteur frontalier par les navires britanniques *Egeria* et *Rattler* d'une part, néerlandais *Banda* d'autre part, apporte en effet des éléments d'information intéressants sur la perception commune de la frontière par les marines respectives des deux parties. Lord Salisbury avertit les autorités néerlandaises le 29 décembre 1890 de son intention de faire procéder à la reconnaissance du secteur en discussion. Le comte de Bylandt propose de transformer l'expédition britannique en une mission conjointe, ce qui est aussitôt décidé.

---

[56] CR 2002/27, p. 32-34, par. 29-32.

[57] CR 2002/28, p. 33-39, par. 11-24.

[58] Mémoire de l'Indonésie, vol. 3, annexe 80.

74. La mission conjointe reçoit pour instructions des deux gouvernements de fixer les points exacts où le parallèle 4° 10' coupe la côte de l'île de Sebatik et d'en dresser des cartes[59].

75. Les navires arrivent à Sebatik le 1er juin 1891. L'*Egeria* et le *Rattler* viennent de Darvel Bay, à l'est. Le *Banda* vient des Indes néerlandaises, au sud. La carte est dressée comme convenu. Vous la trouverez dans les atlas soumis par les deux parties[60] et elle sera projetée à l'instant; vous la trouverez aussi sous la cote 25 dans votre dossier. La carte porte mention des bornes temporaires, ou «*beacons*», posées de part et d'autre de l'île de Sebatik. Le parallèle 4° 10' y est inscrit conformément aux instructions. Il se prolonge à l'est, comme à l'ouest, c'est donc une indication géographique qui ne se confond donc pas avec la frontière envisagée début juin, date à laquelle la carte est dressée.

76. Voilà pour la mission conjointe, elle s'arrête là. Notons qu'on n'envisage à aucun moment de confier à cette mission conjointe le soin de reconnaître une frontière ou un périmètre plus à l'est, alors pourtant que les navires sont sur place et équipés pour ce faire. C'est parce que la question n'a pas été envisagée par les parties. On est en train de terminer la conclusion du traité, on envoie trois navires de guerre sur place avec des équipages et un équipement pour faire des levés et dresser les cartes et on ne pense pas à les envoyer voir un peu plus loin s'il y a quelque chose. C'est parce que dans l'esprit des parties il n'y avait rien. Ce n'est pas tout.

77. L'*Egeria*, navire britannique, a bien reconnu nos îles, il a fait le tour, mais au mois de mai et dans le cadre d'une mission strictement britannique[61]. La carte actuellement projetée sur l'écran, que vous trouverez sous la cote 26 dans le dossier, indique les routes suivies par les navires en question. La route du *Banda* est indiquée en vert, elle est au bas de la carte. Le navire vient de Surabia, aujourd'hui Djakarta dans les Indes néerlandaises, il accomplit sa mission autour de l'île de Sebatik en remontant un peu les fleuves adjacents et retourne à Surabia sitôt après avoir accompli sa mission de reconnaissance de la frontière, comme le note le rapport du commandant van Oyen que vous trouverez dans les annexes aux écritures indonésiennes. L'*Egeria*, de son côté, appareille de Sandakan en mars 1891, procède à des levés à Darvel Bay et à Sipadan en avril et

---

[59] Mémoire de l'Indonésie, vol. 3, annexe 69.

[60] Dossier des juges, onglet 25.

[61] Dossier des juges, onglet 26.

en mai, avant de rejoindre le *Banda* à Sebatik fin mai pour la mission conjointe. Une fois la mission conjointe achevée, le 21 juin, le lendemain de la signature du traité, c'est une coïncidence sans doute compte tenu des moyens de communication de l'époque, l'*Egeria* repart à Sandakan mais en procédant à de nouveaux levés dans le groupe des Ligitan en juillet et en août 1891. Le navire devra revenir l'été suivant, en 1892, pour compléter la campagne de reconnaissance et dresser les cartes correspondantes.

78. A aucun moment, le Gouvernement britannique n'a envisagé d'inclure ces travaux dans le cadre de la reconnaissance conjointe en cours, alors qu'il lui était facile de le faire. A aucun moment le Gouvernement néerlandais n'a fait la moindre remarque ou émis la moindre protestation, alors que ces travaux de reconnaissance n'avaient rien de clandestin, ils ont été relatés par le *British North Borneo Herald* et ils ont sûrement dû faire l'objet de discussions informelles entre les équipages du *Banda* d'une part et de l'*Egeria* et du *Rattler* d'autre part, lors des réceptions traditionnelles dont les rapports nous laissent la trace. Il semble que les équipages se soient parfaitement bien entretenus dans une atmosphère de cordialité gastronomique. Il n'y a pas eu la moindre protestation.

79. La mission conjointe de l'*Egeria*, du *Rattler* et du *Banda*, menée sur instructions communes des services d'Etat dans le cadre de la négociation de la convention du 20 juin 1891, constitue une expression révélatrice de la conception commune que pouvaient avoir les deux Etats de la négociation en cours de parachèvement. De par les conditions dans lesquelles elle se déroule, cette mission exclut toute hypothèse de tracé, dans le secteur, d'un périmètre d'attribution. Les forces navales respectives chargées de cette mission, les premières concernées par un tel périmètre, en auraient été les premières averties. Monsieur le président, Madame et Messieurs de la Cour, j'en arrive à la procédure de ratification de la convention du 20 juin 1891 et à la carte annexée au mémorandum interne du Gouvernement néerlandais.

V. La procédure de ratification et la carte annexée au mémorandum interne du Gouvernement néerlandais

80. Les débats relatifs à la ratification de l'accord au sein des Etats généraux néerlandais ne relèvent pas de la catégorie des travaux préparatoires. Ils sont postérieurs et non pas préparatoires. Ils représentent les vues d'une seule des parties et ne sauraient donc refléter une communauté de

vues, sauf preuve contraire. Ils apportent cependant des éléments d'appréciation qu'il vous appartient de soupeser.

81. La Partie indonésienne ne semble avoir retenu qu'un seul élément de ces travaux : la carte annexée au mémorandum introductif du gouvernement. J'y viens dans un instant rassurez-vous. Mais il me paraît un peu simpliste, réducteur, de ramener à ce seul élément un débat qui fut long, riche, politiquement tendu. Vous en trouverez les éléments dans les annexes aux mémoires des deux Parties[62]. Engagé devant la seconde chambre par le mémorandum du 25 juillet 1891, le débat parlementaire se poursuit jusqu'à la fin mars 1892. La convention est ratifiée par les Pays-Bas le 20 mai 1892 et les ratifications sont échangées à Londres le 22 mai 1892[63].

82. Monsieur le président, j'ai relu avec attention les travaux parlementaires relatifs à la ratification de la convention[64]. Ils présentent ce caractère rébarbatif, répétitif des procès-verbaux parlementaires de tous temps et de tous pays, malgré les efforts du service de séance pour tenter de les enjoliver, les rendre attractifs. Leur accès en est compliqué par la nature manuscrite des quarante-cinq pages d'écriture serrée rapportant la séance plénière de la chambre basse.

83. J'ai noté le sérieux du travail accompli. Les débats en commission sont préparés par un mémorandum du gouvernement, celui auquel est attachée la carte interne. Nous avons inclus la traduction anglaise de ce mémorandum dans le dossier des juges pour votre commodité[65]. La commission parlementaire compétente de la seconde chambre critique le mémorandum, demande des explications au ministre, provoque l'envoi d'un second mémorandum en réponse. Les débats oraux sont approfondis, tant devant la seconde chambre que devant la première chambre des états généraux.

84. Sur le fond, on relève les tics et les obsessions des députés, souvent anciens ministres, spécialisés dans les affaires coloniales. Le débat est rendu plus difficile par le changement de gouvernement entre la signature de l'accord, le 20 juin 1891, et le débat, qui se déroule de décembre 1891 à avril 1892. Le ministre des affaires étrangères, Hartsen, qui avait négocié avec le

---

[62] Mémoire de la Malaisie, vol. 3, annexes 51-53; mémoire de l'Indonésie, vol. 3, annexes 84-88.

[63] Contre-mémoire de la Malaisie, vol. 1, p. 36-37, par. 2.51.

[64] Contre-mémoire de la Malaisie, vol. 1, p. 36-40, par. 2.51-2.59 et références.

[65] Dossier des juges, onglet 33.

comte de Bylandt le texte de la convention du 20 juin 1891 et l'avait signé, est remplacé par van Tienhoven. Le portefeuille des colonies change aussi de titulaire. La tension politique entre l'ancienne et la nouvelle majorité est sensible. Le gouvernement défend néanmoins avec loyauté l'œuvre de son prédécesseur.

85. Quelques questions reviennent souvent. Le traité anglo-néerlandais de 1824 interdisait-il à la Grande-Bretagne d'établir un protectorat sur l'île de Bornéo ? Le gouvernement a-t-il trop lâché en cédant Batoe Tinagat ? La division de l'île de Sebatik suivant le parallèle 4° 10' constitue-t-elle une réponse appropriée au problème de l'accès aux fleuves de Bornéo et à la question de la liberté de navigation ?

86. La ratification de la convention est autorisée sans vote par les deux chambres, motivée principalement par le souci de disposer enfin d'une frontière stable permettant l'exploitation des richesses de Bornéo. Et celui de rester entre puissances amies en évitant que d'autres viennent y mettre le nez. Comme le confie le ministre van Tienhoven à sir Horace Rumbold, ministre de Grande-Bretagne à La Haye :

> *«It was a great thing, he said, for the Dutch to be certain, at this time of universal scrambling for colonial territories, that they would have no neighbours but England. We might admit to ourselves, he added, that our two respective nations were the only ones who understood the management of colonies. Besides which, our commercial principles were the same.»*[66]

87. Les petites îles adjacentes à Bornéo sont évoquées rapidement en commission (petites îles adjacentes aux trois grandes îles : Tarakan, Nanoekan et Sebatik), ainsi que la mission conjointe des navires britanniques et néerlandais. Mais pas un mot, évidemment, sur un éventuel périmètre d'attribution. Quant aux îles qui sont situées au large, elles sont considérées clairement comme relevant du sultan de Solok et non de la souveraineté néerlandaise[67].

88. Un mot, sur la modification du contrat de vassalité entre les autorités néerlandaises et le sultan de Boeloengan[68] au lendemain de la ratification de l'accord. L'assiette territoriale de Boeloengan est évidemment modifiée du fait de la signature de la convention du 20 juin 1891. Mais les petites îles en question, qui sont visées par le contrat de vassalité, sont celles qui

---

[66] Sir Horace Rumbold à lord Salisbury, 18 mars 1892, mémoire de l'Indonésie, vol. 3, annexe 84.

[67] Mémoire de la Malaisie, vol. 3, annexe 51.

[68] Watts, CR 2002/28, p. 27, par. 80-81.

«appartiennent» aux trois îles explicitement désignées, Tarakan, Nanoekan et Sebatik et qui se trouvent situées au sud de la frontière ainsi déterminée. Il faut toute la fantaisie de sir Arthur Watts pour y voir la consécration d'un périmètre d'attribution projeté à 50 milles au large.

89. Personne, dans le débat parlementaire ou d'ailleurs par la suite, ne songe à dissocier le cas de Ligitan ou de Sipadan de celui des autres îles situées au large, en haute mer, de la côte nord-est de Bornéo.

90. Car Sipadan ? Et Ligitan dans tout cela ? Silence. Et le soi-disant périmètre d'attribution prévu par l'article IV ? Silence. Et la carte annexée au mémorandum du Gouvernement néerlandais ? Silence, alors que les parlementaires ont épluché par le menu le texte de la convention, ont demandé des explications complémentaires aux services. Singulier silence. Je m'explique. Voilà un gouvernement en situation difficile, qui vient de succéder à un autre gouvernement avec des problèmes de majorité, mis en difficulté sur la possession que le gouvernement était accusé d'avoir acceptée sur Batoe Tinagat. Il n'a pas l'idée d'opposer dans le débat parlementaire, par un réflexe naturel, spontané, et politique, le petit gain territorial éventuel qu'aurait pu représenter un périmètre d'attribution tracé selon les vues et les vœux de l'Indonésie ? Ce silence, c'est parce qu'il n'y a pas, qu'il n'a jamais été question d'un périmètre d'attribution. Qu'il n'a jamais été question d'attribution d'îles se trouvant en haute mer.

91. J'en arrive maintenant, Monsieur le président, Madame et Messieurs de la Cour, à la carte annexée au «Mémorandum explicatif n° 3» transmis par le Gouvernement néerlandais aux deux chambres des états généraux[69]. D'abord cette carte est dressée à très petite échelle : 1/1 500 000^{e}. Je rappelle qu'une carte routière est généralement dressée à une échelle d'environ 1/200 000^{e} ou 1/250 000^{e} suivant les pays et les cartes de randonnée alpine au 1/50 000^{e}, voire moins. Cette carte en question est donc un bon outil pédagogique pour donner aux parlementaires une idée des positions avancées au cours de la négociation par les uns et par les autres. Son exactitude est fort approximative. Ni Pulau Sipadan, ni Pulau Ligitan ne s'y trouvent désignées, et pour cause, puisque ces îles n'ont pas toujours été situées et reconnues avec exactitude. Quant au

---

[69] Dossier des juges, onglet 27.

trait rouge qui figurerait une ligne d'attribution, il s'arrête à Pulau Maboel, bien avant Ligitan. M. Crawford vous en parlera longuement cet après-midi.

Ce croquis approximatif est loin de répondre à l'exigence de Max Huber — souvenons nous : «*the first condition required of maps that are to serve as evidence on points of law is their geographical accuracy*»[70]. Or, c'est sur ce croquis, et sur ce seul croquis, que repose la fragile démonstration juridique de l'Indonésie. Nos contradicteurs admettent les faiblesses du croquis. Ils admettent que les parties n'avaient pas idée de la situation géographique de Sipadan et de Ligitan au moment ou le croquis fut dressé. Ils voudraient cependant nous faire considérer ce croquis comme une carte officielle annexée au traité et établissant l'existence d'un périmètre d'attribution.

Pour ce faire, nos contradicteurs sont obligés de jouer avec les mots[71]. Ils tentent de faire croire que la carte a été «*forwarded*», transmise par les autorités néerlandaises aux autorités britanniques. Que la carte a été «*communicated to the British authorities who raised no objections*». Que la carte «*was known officially to the British Government in the context of the 1891 Convention.*»[72] Que la carte a été officiellement et publiquement promulguée — je trouve le terme dans les écrits indonésiens — érigée en accord international «*constituted by the official and public promulgation of the Explanatory Memorandum Map*»[73].

92. Pure invention que tout cela ! Nos contradicteurs n'apportent pas le moindre commencement de preuve à l'appui de leurs dires. Le ministre de Grande-Bretagne à La Haye, sir Horace Rumbold, et ses collaborateurs suivaient avec attention les débats publics des états généraux. Bons diplomates, ils ont transmis à Londres les documents parlementaires publics, dont le mémorandum du Gouvernement néerlandais et la carte annexée, bien fait, pour illustrer le débat. Mais ceci n'a rien à voir avec une communication officielle. Quant à la notion de promulgation, elle a été introduite dans la Constitution néerlandaise en 1953, léger anachronisme. La vérité oblige à dire que le Gouvernement néerlandais ne s'est prévalu ni lors de la négociation, ni lors de

---

[70] *RSA*, vol. 2, p. 852.

[71] Réplique de l'Indonésie, p. 53-55, par. 4.34-4.38.

[72] Watts, CR 2002/28, p. 22, par. 63.

[73] Contre-mémoire de l'Indonésie, vol. 1, p. 77, par. 5.47.

l'échange de ratification, ni à aucun moment par la suite du croquis alors établi aux fins de démonstration à l'intention exclusive des chambres néerlandaises.

93. Nous sommes loin des hypothèses dans lesquelles un Etat est obligé de réagir pour préserver ses droits. L'Indonésie a cité votre arrêt dans l'affaire *Qatar c. Bahreïn*. Mais les minutes de Doha furent négociées entre les parties. Ici, aucune trace de négociation autour de ce qui constituait un document interne néerlandais. Ce document ne saurait en aucune manière être considéré comme un «accord ayant rapport au traité» ou comme un «instrument établi par une partie» à l'occasion de la conclusion du traité et accepté par l'autre partie en tant qu'instrument ayant rapport au traité au sens de la convention de Vienne.

94. Il ne saurait davantage être pris en compte au titre de la pratique subséquente des parties à la convention. Dans l'affaire de *l'Île de Kasikili/Sedudu*, vous avez clairement rappelé que la conduite subséquente ne peut être prise en compte pour l'interprétation d'un traité que dans la mesure où elle «établit l'accord des parties à l'égard de l'interprétation du traité»[74] suivant les termes de l'article 31, paragraphe 3, alinéa *b)*, de la convention de Vienne. Le Gouvernement britannique n'a jamais consenti, explicitement ou implicitement, à être lié par ce croquis, qui ne saurait donc être retenu à fin d'interprétation de la convention de 1891.

95. Un mot sur l'analogie avec la carte du *Livre jaune* de l'affaire *Libye/Tchad*. L'Indonésie tente une comparaison qui ne résiste pas à l'examen. Dans l'affaire *Libye/Tchad*, la lettre du traité, en l'espèce l'échange de lettres du 1er novembre 1902, se référait explicitement à «la carte annexée à la déclaration du 21 mars 1899». Dans votre sagesse, vous avez considéré que la carte ainsi mentionnée ne pouvait être que la carte du *Livre jaune*[75]. Cette carte acquérait de ce fait statut de carte annexée à *l'instrumentum* de 1902, *instrumentum* lui-même intégré ensuite au traité de 1955. Par deux fois, les parties, France et Italie, puis Libye avaient ainsi, et *par traité*, par l'ancien instrument conventionnel, intégré la carte dans le règlement conventionnel et manifesté leur accord sur le tracé, pas simplement par un comportement mais par l'intégration dans un instrument conventionnel ultérieur.

---

[74] *C.I.J. Recueil 1999*, par. 63.

[75] *C.I.J. Recueil 1994*, par. 61.

96. Ici, rien de tel. La convention de 1891 ne se réfère à aucune carte et personne ne prétend qu'elle a été accompagnée d'une carte. Les parties n'ont convenu entre elles, à aucun moment, avant la négociation de la convention [illegible] une carte. Elles n'ont invoqué, dans leurs négociations, aucune carte. Dans cette affaire, il n'existe pas de carte incorporant, exprimant la volonté commune des parties à la convention. Le croquis interne produit par l'Indonésie ne saurait en aucune hypothèse en tenir lieu.

VI. Les accords ultérieurs intervenus entre les parties

97. Tout d'abord, on peut observer qu'il existe une carte officielle. Oui, entre les parties; le traité du 20 juin 1891. Mais ce n'est pas une carte annexée à la convention du 20 juin 1891. C'est la carte annexée à l'accord de 1915 conclu entre les deux parties pour préciser le tracé de la ligne frontière. Cet accord est incontestablement un «accord ultérieur intervenu entre les parties au sujet de l'interprétation du traité ou de l'application de ses dispositions», vous avez reconnu la formule de l'article 31, paragraphe 3 *a)* de la convention de Vienne.

98. A notre connaissance, il existe trois accords ultérieurs relatifs à l'interprétation de la convention de 1891 et conclu en application de l'article V de ladite convention : l'échange de notes des 16 et 3 octobre 1905[76]; l'accord de Londres du 28 septembre 1915[77]; la convention de La Haye du 26 mars 1928[78]. Ces trois accords ultérieurs méritent tous à un titre ou à un autre votre attention.

99. D'abord l'échange de notes de 1905 pose le problème de la prolongation du parallèle 4° 10' de latitude nord. Mais à partir de Broershoek et vers l'ouest. Il concerne la frontière terrestre. C'est la BNBC qui souhaite faire acter cette prolongation du parallèle vers l'ouest dans le silence total du traité. Elle n'est pas explicitement prévue en effet par l'article II du traité. Les Pays-Bas contestent cette interprétation de la BNBC, se retournent vers le Gouvernement britannique, le marquis de Lansdowne, secrétaire au Foreign Office donne raison aux Pays-Bas. Une telle prolongation ne se présume pas.

---

[76] Contre-mémoire de la Malaisie, vol. 2, annexe 2.

[77] Mémoire de la Malaisie, vol. 2, annexe 27.

[78] Mémoire de la Malaisie, vol. 2, annexe 28.

100. C'est surtout l'accord de 1915 qui mérite de retenir votre attention davantage. La situation a changé entre 1891 et 1915. On a fait des progrès importants en matière d'exploration et de cartographie. Souvenons-nous qu'en 1891, les navires britanniques n'osaient pas remonter les fleuves à l'intérieur de l'île de Bornéo à plus de 20 milles en raison des maladies; les cartes marines localisaient en 1891 très imparfaitement Ligitan, au nord du parallèle 4°10' et ignoraient souvent Sipadan.

101. Depuis, le secteur a été reconnu, par les Britanniques dès 1891-1892 avec les croisières de l'*Egeria*; par les Etats-Unis avec le *Quiros*; par les Néerlandais eux-mêmes et à plusieurs reprises, on nous l'a rappelé. Les cartes marines des armées situent correctement les deux îles au sud du parallèle 4°10', au sud du soi-disant périmètre d'attribution.

Or les parties, engagées dans une procédure d'interprétation plus précise de la convention de 1891, et au vu de ces connaissances nouvelles, ne tirent aucune conséquence de ce flot d'information par rapport à la négociation de 1891. Au contraire, l'accord de 1915, lui, décrit la frontière d'est en ouest, en commençant par le point marqué par la borne frontière située sur la côte orientale de l'île de Sebatik. Il va donc partir de la côte orientale de l'île de Sebatik, traverser l'île de Seabatik par le parallèle 4° 10' et ensuite se prolonger vers l'intérieur. Aucune indication dans la rédaction, bien au contraire cette fois-ci, ne permet de supposer l'existence d'une ligne ou d'un périmètre d'attribution au-delà de Sebatik. En revanche, à l'autre extrémité de la frontière couverte par l'accord de 1915, la soudure, si je puis dire, de la frontière avec celle prévue par l'article III de la convention de 1891 est explicite : la frontière suit la ligne de partage des eaux entre les rivières Sedalir et Sesajap jusqu'au point de jonction avec la ligne de partage des eaux principale décrite dans l'article III de la convention : «*until they meet the main watershed described in Article III of the Treaty*». En d'autres termes, lorsque la frontière se prolonge, on le dit et on le dit à l'ouest parce qu'en effet l'accord de Tawa ne concerne qu'une partie de la frontière. A partir du moment où elle est prolongée, on a dit que «*until they meet the main watershed described in Article III*».

102. La carte annexée à l'accord de 1915 est une carte officielle[79]. Signée par les commissaires, elle est intégrée à l'*instrumentum*. Elle scelle l'accord des parties. Or, de manière

---

[79] Dossier des juges, onglet 30.

significative, cette carte indique bien la jonction entre la frontière définie par l'article II et celle définie par l'article III, sous forme d'une entame de ce nouveau secteur de frontière[80]. Voilà à l'écran la frontière occidentale de l'accord de 1915 à B. Padas et on voit bien ensuite l'indication cartographique de l'entame de la frontière qui continue suivant l'articulation de l'article 2 et de l'article 3 de l'accord. En revanche, rien de tel sur la côte orientale de l'île de Sebatik. La frontière s'arrête net[81]. S'il y avait eu volonté de raccord entre le travail fait par la commission mixte et l'ensemble de la frontière, les parties l'auraient indiqué de la même manière qu'ils l'ont fait pour la partie occidentale de la frontière.

103. Alors nos contradicteurs font valoir que l'accord de Tawao ne concernait que la démarcation de la frontière terrestre. Là, pour une fois, puisqu'on ne dit rien, ça ne concerne que la frontière terrestre, bien sûr. Petite contradiction, je le note en passant, avec la thèse principale de l'Indonésie. Mais, en l'espèce, réduire l'accord de Tawao à un accord de démarcation stricte est inexact. Il ne s'agit pas de démarcation *stricto sensu*; les commissaires prennent des libertés avec le texte de la convention de 1891 à plusieurs endroits de la frontière terrestre, libertés entérinées ensuite par les signataires de l'accord de 1915, le secrétaire d'Etat au Foreign Office, lord Grey, l'ambassadeur des Pays-Bas, de Marees van Swinderen. Au sein de la commission mixte prévue par la procédure de Tawao, le Gouvernement néerlandais a pris le soin de nommer un officier de marine, le second lieutenant Vreede. Or la marine néerlandaise, nous l'avons vu, savait parfaitement à quoi s'en tenir sur les coordonnées géographiques de Sipadan et de Ligitan. Si le lieutenant Vreede avait eu le moindre doute quant à l'existence d'un périmètre d'attribution, il en aurait pour le moins averti sa hiérarchie et attiré l'attention de l'état-major de la marine néerlandaise sur le problème afin de préciser les choses dans l'accord à venir. Il ne l'a pas fait, pour une bonne raison : c'est qu'il n'y avait pas de ligne ou de périmètre d'attribution.

104. Enfin, l'accord de 1928 confirme cette conclusion. Entre-temps — mon collègue le professeur Schrijver y reviendra plus longuement —, la question de la délimitation des espaces maritimes a été évoquée au plus haut niveau gouvernemental néerlandais, notamment à l'occasion de la croisière du *Lynx*. Observons qu'il ne s'agit plus ici de travaux préparatoires ou de conduite

---

[80] Dossier des juges, onglet 28.

[81] Dossier des juges, onglet 29.

subséquente des parties, mais d'un examen unilatéral du problème plus de trente ans après la conclusion du traité. En l'espèce, les services compétents ont réexaminé l'ensemble des données du problème. Le ministre des colonies décide de ne pas donner suite aux demandes de précision avancées par l'état-major de la marine. Après avis du service juridique du ministère des affaires étrangères, le ministre classe le dossier en 1926; il considère qu'il n'y a plus rien à dire sur ce bout-là de la frontière, si je puis dire, alors que, pourtant, s'ouvrent les négociations qui conduisent à l'accord de 1928 pour préciser le tracé frontalier de la convention de 1891 dans un autre secteur. Encore une occasion, une superbe occasion après les aventures du *Lynx*, pour préciser les choses entre les deux parties. Une occasion manquée ? Non, en vérité, pas une occasion puisqu'il n'y avait pas de périmètre d'attribution.

105. Pour résumer mon propos, Monsieur le président, Madame et Messieurs de la Cour, je constate que rien dans le texte de la convention du 20 juin 1891, interprété suivant son sens naturel et ordinaire, ne permet de conclure à l'existence d'un périmètre d'attribution attribuant les îles de Ligitan et de Sipadan aux Pays-Bas; que rien, dans les travaux préparatoires ou le débat de ratification de l'accord ne permet d'avancer une telle hypothèse; en particulier, que rien n'indique que la carte interne produite par le Gouvernement néerlandais à l'occasion de ce débat constitue un accord ou une pratique ultérieure entre les parties à cet effet; que rien, dans les accords ultérieurs de 1905, 1915, 1928, ne laisse à penser qu'un tel périmètre d'attribution avait été envisagé par les parties à la convention de 1891. Que rien, dans les débats internes au Gouvernement néerlandais, débats sur lesquels le professeur Schrijver reviendra tout à l'heure, ne permet de conclure à l'existence d'un périmètre d'attribution, bien au contraire.

106. Monsieur le président, Madame et Messieurs de la Cour, je vous remercie de l'attention que vous avez portée à mon propos. Monsieur le président, je vous prie d'appeler maintenant à la barre le professeur James Crawford, à moins que vous estimiez que le moment est venu de faire une pause.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La séance de la Cour est suspendue pour une dizaine de minutes.

L'audience est suspendue de 11 h 30 à 11 h 40.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne maintenant la parole au professeur James Crawford, en le priant de parler un peu plus lentement qu'hier soir.

Mr. CRAWFORD: Sir, I was telling myself the same thing! The "graveyard" slot with a 6 o'clock deadline was the problem! Mr. President, Members of the Court.

MALAYSIA'S TITLE TO THE ISLANDS: TRANSACTIONS IN THE PERIOD 1900-1932

Introduction

1. Yesterday I showed that the two islands in dispute, along with Kapalai and the other islands in the Ligitan Group, that is to say, Danawan and Si Amil, were not part of British North Borneo in 1891. They could not therefore have been allocated to the Netherlands by the 1891 Boundary Convention, whatever that Convention might have said, and however its effect may have been depicted in internal maps. As you have just heard from Professor Cot, a difficult man to follow as you will understand, the Convention did not in fact deal at all with the two islands. That being so, Indonesia's case fails — and I am tempted to sit down!

2. It is, however, useful to discuss how the islands came to be part of British North Borneo. The history shows that no one before 1969 ever considered them to be part of the Netherlands or of Indonesia. It also shows that the islands were administered by the BNBC.

Transactions concerning the islands post-1891

3. Mr. President, Members of the Court, let me start by asking what difference the 1891 Convention made to the administrative status quo concerning the islands south of Semporna. The answer is clear from the record; it made absolutely no difference. The Netherlands made no attempt to assert any claims to islands to the east of Sebatik. By contrast, the BNBC did. To take just one example, Lt. Boughter, the American captain of the ship *Quiros*, when he visited the island of Danawan in June 1903 was told that the Resident of Lahad Datu, a BNBC official, settled disputes over turtle egg collection on Sipadan, which was described as an "appanage" of Danawan[82]. Sir Elihu Lauterpacht will say more about this this afternoon.

---

[82] **Memorial of Malaysia, Vol. 3, Ann. 63.**

4. Mr. Bundy complained that Malaysia was inconsistent in relying on Spanish sovereignty while admitting that Spain did nothing to give effect to the sovereignty[83]. But it is the simple truth. Britain recognized Spanish sovereignty over islands beyond 9 nautical miles from the coast all the way down to the Sibuko River. It did that in the Madrid Protocol in 1885. Spain did nothing. The period of Spanish inactivity covered 22 years, from the failure, by Spain, to seize Sandakan in September 1878[84] to the Convention between Spain and the United States in 1900 — so that is 22 years of inactivity. Indonesia, for its part, claims sovereignty over the islands despite inactivity for 110 years; so I am surprised that a mere period of 22 years should seem to it to be a problem. But the fact is that during those 22 years, Britain expressly acknowledged Spanish sovereignty to islands beyond 9 nautical miles. That British acknowledgement, in the 1885 Protocol, was expressly relied on by the United States after 1900. That is a simple fact.

(a) *Transactions leading to the 1907 Exchange of Notes*

5. So that brings me to the United States period, from 1900. I must pay tribute to Mr. Bundy for hi[illegible]ne attempt to confuse this period. Confronted with that forensic excellence of a different character, it may assist the Court to provide a chronological list of all of the relevant documents and maps in the record covering the period between 1900 and 1907. You will find this list in tab 35, and you may find it helpful to follow through it with the dates in strict chronological order and it covers all of the documents in the record on both sides. The reason we emphasize these documents is that they show the facts on the ground in precisely the relevant places at a very important time. If the Netherlands had acquired certain islands south of Semporna in 1891, this was just the time that it should have been doing something about them — changing its maps, establishing a naval base, licensing turtle egg collectors, protesting if some third State laid claim to the islands. But in fact the Netherlands did none of these things. And the documents referred to in tab 35 show that neither the United States nor Great Britain gave the slightest consideration to any alleged rights of the Netherlands, or to any alleged allocation line at 4° 10'. The issue was exclusively one between the United States and Great Britain on behalf of the BNBC. And it

---

[83] CR 2002/28, p. 49, para. 30 (Mr. Bundy).

[84] See the Protest, Memorial of Malaysia, Vol. 4, Ann. 78, signed *inter alia* by Nakoda Gumbah, subsequently Native Magistrate of Darvel Bay: see also Reply of Malaysia, para. 2.7, note 10.

concerned, among others, the whole group of islands to the south of Semporna. I leave it to the Court to read and analyse the documents and transactions for itself, but having them in chronological order helps. The facts those documents reveal are graphic, well-documented, they have specific reference to the Ligitan Group, including Ligitan and Sipadan by name.

6. Before I go on to deal with these transactions in a little more detail, it may help if I present the two opposing views, between Mr. Bundy and myself.

7. According to *Malaysia*, the United States asserted sovereignty over all the offshore islands beyond 9 nautical miles, including the islands in the Ligitan Group, and maintained that claim until the final settlement in 1930. It is true that the focus of United States attention was the islands further north, especially the Turtle Islands, but the United States claim extended down to 4° N, and covered all the islands to the west of the line shown on the map annexed to the 1907 Exchange of Notes. That is the Malaysian position.

8. According to *Indonesia*, the United States asserted title only as far south as Sibutu Islands or Sibutu Group. Lt. Boughter of the *Quetos* was acting without authority, and the United States disavowed his claim. Subsequently, there is no evidence that anyone ever thought again of Sipadan and Ligitan in conjunction with the Agreements of 1907 and 1930, and the reason, according to Mr. Bundy, was that the two islands belonged to the Netherlands[85].

9. Now, in a moment I will show you that the documents sustain Malaysia's position and refute Indonesia's. But before I do so, let me ask the following question. Let us assume that Indonesia is correct in its reading of the United States action. Assume the United States never made any claim south-west of Sibutu, that it disowned Lt. Boughter and withdrew his claims. What would follow from that? *Not* Indonesian sovereignty over the islands. What would follow is that the BNBC would have gone on, as before, administering the islands. And the question to keep asking in all of this is: *where were the Dutch?* The Dutch never did anything. They never claimed the islands, as we have shown. They never published a single map showing the islands as Dutch, as I will show this afternoon. They never protested. They were never mentioned, *because* they had made no claim. Thus even if Indonesia is right in its analysis of the United States position, that

---

[85] CR 2002/29, p. 13, para. 69 (Mr. Bundy); p. 14, paras. 72-73 (Mr. Bundy); p. 15, para. 75 (Mr. Bundy); p. 15, para. 78 (Mr. Bundy); p. 16, paras. 79-80 (Mr. Bundy); p. 17, para. 82.

would still not help it. If the United States had not expressed any interest in the islands south of Semporna, the position would be that the BNBC as the actual possessor would have acquired title to the islands beyond 9 nautical miles in default of any other claimant. And that situation would have been consolidated decades before the eventual Indonesian claim in 1969. Professor Pellet said on Monday that if Malaysia could not establish that the islands belonged to Sulu before 1878, its claim would fail[86]. That is absolutely not true. Even if no State had title over the islands, they were administered by the BNBC. They may not have been *terra nullius*, but assume that no other State claimed them before 1963 — the date on which Sabah joined Malaysia. By the mere fact of long-established BNBC and British administration they would have been British by then, irrespective.

10. But all this is counter-factual. The fact is that the United States *did not* disavow Lt. Boughter, it *did* assert claims to islands south-east of Sibutu, it *did* negotiate these claims, and it *was* recognized that the negotiations were completed in 1930 affected the Ligitan Group. That being so, both the law and the facts are as Malaysia has consistently stated them. But in any event, even if the law was different, the facts would remain. Britain could not have given the islands to the Dutch in 1891, and it did not do so: they did not belong to Britain and they were not part of the negotiations leading to the 1891 Convention. Subsequently it administered the islands under claim of right and no one else did. *In any event*, the islands would now be Malaysian.

11. Let me turn then to the documents listed in tab 35. I have highlighted the most important documents in bold. The list is complete, as I have said, it covers all documents in the record which can be dated to the period 1900-1907. I have excluded one map, produced by Indonesia in its Reply, which Mr. Bundy relied on rather a lot[87] — it is map 9 in their Reply. The only date on that document is the archival date of 1926. I suspect it was produced around 1926, as part of the preparations for the 1930 Convention. I will ignore it for present purposes.

12. We start with the 1900 Treaty[88]. This refers to "*any and all* islands belonging to the Philippine Archipelago . . . and particularly . . . the islands of Cagayan Sulú and Sibutú and their

---

[86] CR 2002/27, pp. 43-44, para. 21 (Prof. Pellet).

[87] Reply of Indonesia, map 9.

[88] Memorial of Malaysia, Vol. 2, Ann. 21.

dependencies". Now if I say that I like any and all cheeses, and particularly camembert and gorgonzola, no one would suggest that I dislike stilton or brie: in fact I do like any and all cheeses! Yet that is Indonesia's interpretation of the 1900 Convention[89]. The words "in particular" are taken as words of limitation, when they are words of particularization. As I will show, this is not the interpretation the United States followed.

13. The 1900 Treaty was published and the record shows no expression of interest or concern from the Netherlands. So *where were the Dutch?* They were not concerned.

14. What is significant is that there are two independent internal legal opinions on the situation, one on the American and one on the British side. Their internal documents reached identical conclusions.

15. The first legal opinion is that of Secretary Hay on 3 April 1903: it is tab 36[90]. Before acting — contrary to the impression given by Mr. Bundy — the Navy asked for his opinion and he gave it. Hay approved in advance the interpretation on which the first edition of the Hydrographic Office map was based. The War Department gave instructions accordingly on 12 May[91] and in June the Hydrographic Office map, First Edition, was produced[92]. At about the same time, on 19 June, Lt. Boughter of the *Quiros* was explaining the legal position to a no doubt somewhat baffled Panglima of Bakkungaan[93]. One can imagine the interview. From 3 April to 19 June is pretty good for the despatch of legal advice from the Secretary of State to the Panglima of Bakkungaan! Shortly after, the *Quiros* visited Danawan and Lt. Boughter heard about the BNBC settling disputes concerning the collection of turtle eggs on Sipadan[94]. On 24 June, Lt. Boughter was at Lahad Datu, the regional administrative centre, and had an exchange with the officer in charge about BNBC administration of Danawan[95]. The response to these events was immediate,

---

[89] CR 2002/28, p. 50, para. 36 (Mr. Bundy).

[90] Memorial of Malaysia, Vol. 3, Ann. 55.

[91] Reply of Indonesia, Vol. 2, Ann. 6.

[92] Memorial of Malaysia, Vol. 5, map 5.

[93] Memorial of Indonesia, Vol. 3, Ann. 100.

[94] Memorial of Malaysia, Vol. 3, Ann. 63.

[95] Memorial of Indonesia, Vol. 3, Ann. 100; Memorial of Malaysia, Vol. 3, Ann. 56; Memorial of Malaysia, Vol. 3, Ann. 57.

and on 13 July 1903 BNBC Chairman Martin, was based in London, wrote to the Foreign Office[96]. This letter is important because it sets out the considered view of the BNBC, and also because it attached a map showing the islands under BNBC administration. This is the origin of the red line on the map annexed to the 1907 Exchange of Notes. It goes back to the 1903 letter of Chairman Martin of the BNBC.

16. Meanwhile on 22 July, Lt. Boughter went ashore on Sipadan and left a plaque. Unfortunately it hasn't survived. He also visited Ligitan[97]. The Secretary of the Navy was duly informed[98]. On 8 August the Hydrographic Office issued a memorandum setting out the method for "delineating the S.W. boundary of the United States possessions in the Philippines" on United States charts[99]. In October the War Department sought approval of this procedure, which was fully in accord with Secretary Hay's memorandum of 3 April[100].

17. By this stage, however, the alarm caused by the voyage of the *Quiros*, having been raised by the BNBC with Britain, had evidently been communicated to the State Department. Colloquially, we may say the cat was amongst the pigeons or perhaps the sea serpent was amongst the megapodes. In a letter of 23 October 1903, the Navy Department was instructed not to "mark the boundary line of the Sulu Archipelago upon our charts until a mutual agreement has been arrived at between the United States and the British government". Instead a proviso was inserted reserving all rights of the United States under the Treaty of 1900[101]. This was shown on the second edition of the map, which Mr. Bundy showed you[102]. But there was absolutely no disavowal of Lt. Boughter's acts: he was commended for his work "among the outlying possessions of the United States"[103]. Moreover, although the State Department declined to commit itself on the facts in the letter, also of 23 October, that Secretary Hay wrote to the Acting Secretary of War and of

---

[96] Memorial of Malaysia, Vol. 3, Ann. 59.

[97] Memorial of Indonesia, Vol. 3, Ann. 101.

[98] Memorial of Malaysia, Vol. 3, Ann. 61.

[99] Memorial of Malaysia, Vol. 3, Ann. 62.

[100] Reply of Indonesia, Vol. 2, Ann. 8.

[101] Memorial of Malaysia, Vol. 3, Ann. 63; Counter-Memorial of Indonesia, Vol. 2, Ann. 30; Reply of Indonesia, Vol. 2, Ann. 9.

[102] Reply of Indonesia, Vol. 1, map 8.

[103] Reply of Indonesia, Vol. 2, Ann. 9.

which Mr. Bundy made so much[104], the legal basis for the United States position in the subsequent discussions with Great Britain was precisely that of Secretary Hay's letter of 3 April 1903[105]. There was no withdrawal, no disavowal, merely a holding operation taken without prejudice — the "without prejudice" clause being the proviso on the second edition of the Hydrographic Office map. This was done "for the present"[106], while the situation was sorted out with the British. You can see that from a series of later documents, and especially Secretary Hay's letter of 2 March 1904 to the Secretary of the Navy[107]. Thus he was able to assure the British Ambassador on 10 December 1904 that nothing would be done pending an agreement with the British which would "fairly represent the intention of the parties to the protocol of 1885" and would produce "a definitive settlement of the matter"[108]. There was absolutely no suggestion that Dutch consent was required for "a definitive settlement of the matter", and for good reason: the Dutch had made no claim and expressed no interest in what was going on.

18. The British were slower to act than the United States Navy had been. But on 10 March 1905 an internal Foreign Office memorandum set out the British legal view of the situation. This is the second independent legal opinion. It is tab 37 in your folders. It said that:

> "since all the islands visited by the 'Quiros' [all the islands] lie admittedly beyond the three marine league limit from the coast and since neither the Company nor their predecessors obtained any further territorial concessions from the Sultan, the Company's case falls at once to the ground, for they can never have had any rights to the islands they now claim"[109].

The Foreign Office legal opinion rejected the Sultan's confirmation of 1903 as invalid, and it noted that if there had been any conflict between the 1878 Grant and the 1885 Protocol, the 1885 Protocol would prevail. The resulting British acceptance of the United States legal position was communicated by Ambassador Durand in Washington to Secretary Hay on 29 September 1905[110].

---

[104] Memorial of Indonesia, Vol. 3, Ann. 104; CR 2002/28, p. 52, para. 44 (Mr. Bundy).

[105] Memorial of Malaysia, Vol. 3, Ann. 55.

[106] Reply of Indonesia, Vol. 2, Ann. 5, 6th endorsement.

[107] Memorial of Indonesia, Vol. 1, Ann. 106.

[108] Memorial of Malaysia, Vol. 3, Ann. 65.

[109] Memorial of Indonesia, Vol. 3, Ann. 109.

[110] Memorial of Malaysia, Vol. 3, Ann. 66.

The Court will note that it took longer for legal advice to get from London to Washington than it did from Washington to the Great Bakkungaan Island!

19. But the legal advice was the same on both sides of the Atlantic. The dominant instrument was the 1885 Protocol. That determined in principle the extent of the offshore islands of Sulu. On the other hand, the United States declined the invitation to cede some of the islands to Great Britain, even though the Secretary of the Navy was advised that "[t]he interests of the United States would not suffer if they should be resigned or ceded to the Government of British North Borneo"[111]. The line on the map forwarded by Ambassador Durand to Secretary Hay in 1906, which was itself based on the line on the map given by the BNBC to the Foreign Office in 1903, was annexed to the Exchange of Notes of 1907 and formed an integral part of it[112]. It was a red line down to 4° N. As Secretary Hay said in his letter to Ambassador Durand of 19 December 1906, the arrangement covered "the islands to the westward and south-westward of the line traced on the map which accompanied your memorandum of June 23"[113]. The Exchange of Notes used the same language, but it was even clearer: it said "*all* the islands"[114].

20. Mr. President, Members of the Court, I suggest the following five conclusions may be drawn.

(1) The whole transaction proceeded on the basis that *all* the islands in question, including the islands in the Ligitan Group, were actually administered by the BNBC. Lt. Boughter had found the facts, in what Mr. Bundy describes as a "fact-finding mission"[115]. On that basis the question was, not who is in actual possession, but who has title?

(2) The British legal advice agreed with the position taken by the United States in April 1903: that is to say — and I quote from Secretary Hay's initial memorandum — "the sovereignty of the United States covers all outlying islands, islets and reefs that lie more than three marine leagues from the coast of British North Borneo . . ." The position of the BNBC that it had title to these islands was rejected, even though no one doubted its actual possession.

---

[111] Counter-Memorial of Indonesia, Vol. 2, Ann. 30.

[112] Memorial of Malaysia, Vol. 2, Anns. 23-24; Memorial of Malaysia, Vol. 5, map 6.

[113] Memorial of Indonesia, Vol. 3, Ann. 112.

[114] Memorial of Malaysia, Vol. 2, Anns. 23-24.

[115] CR 2002/28, p. 51, para. 38 (Mr. Bundy).

(3) The only reason the United States did not go ahead and disseminate the first edition of the Hydrographic Office map was that Great Britain on behalf of the BNBC urged that some agreement be entered into; not that Great Britain disagreed with the United States legal position, but because the Company was administering the islands. And the United States was amenable to some arrangement.

(4) The United States did not, however, cede any of the islands to the BNBC. Rather it gave the company a permissive occupancy down to 4° N. That arrangement was not limited to islands to the north or north-east of Sibutu.

(5) There was in none of the discussions the slightest suggestion that the interests of any third State were involved, or that there was an allocation line in favour of the Dutch at 4° 10' N, or that any of the islands were claimed by the Dutch. The issue was exclusively one between the United States and Great Britain. The arrangement covered all the islands to the westward and south-westward of the red line traced on the Durand map, which went down to 4° N.

21. In fairness to Mr. Bundy, I should add that Secretary Hay, after finding out about the British concerns, noted that the inclusion of Sipadan within the scope of the United States territories would require to be "supported by evidence that Sipadan and the included keys and rocks had been recognized as lying within the dominions of Sulu"[116] — so he reserved that point. There was an issue of fact here, on which he expressed no opinion. But there is no suggestion in the documents that the consequence of the islands not being part of Sulu would have been that they were Dutch. They would have belonged to the BNBC, since the BNBC was in possession, and if the islands were not claimed by the United States, as I have said, the status quo would have remained and been consolidated in the absence of the claim of any other State.

22. But two points should be noted as to Secretary Hay's October reservation. First, as I have shown, the islands were part of Sulu and were never part of Bulungan, so the factual issue on which Secretary Hay declined to express an opinion at the beginning of the negotiations with Britain was to be resolved in favour of the United States. And secondly, at the end of the

---

[116] Memorial of Indonesia, Vol. 3, Ann. 104.

negotiations, the position taken by the two States was clear. The red line on the annexed map did go down to 4° N, and it did cover all islands to the westwards, including the Ligitan Group.

23. The 1907 Exchange of Notes was published by both the United States and the United Kingdom at the time. It attracted no comment or protest from the Netherlands, nor should it have. Again, I ask, *where were the Dutch?* They were behaving consistently; they did not have a claim to the islands affected.

(b) *The effect of the Anglo-American Boundary Convention of 1930*

24. Mr. President, Members of the Court, I turn now to the effect of the Anglo-American Boundary Convention of 2 January 1930[117]. On this I can be comparatively brief.

25. The Convention of 1930 established a line "separating the islands belonging to the Philippine Archipelago on the one hand and the islands belonging to the State of North Borneo which is under British protection on the other hand". So it was a clear and express allocation line. The line was depicted in two annexed maps, one covering the southern and one the northern parts of the east coast[118]. Article III provided that "all islands to the south and west of the said line shall belong to the State of North Borneo". You will note again the words "all islands" and you will see the contrast with Article IV of the 1891 Convention which referred only to a single island, the island of Sebatik, and which did not establish an allocation line.

26. The line shown on the 1930 Treaty map differs from the Durand line in certain respects — I will show you these lines later on. This gave rise to discussions as to the territorial implications of the difference between the Durand line and the 1930 line. In earlier memoranda both the United States and Britain, or officials on their behalf, had noted that the identification of the islands affected by the 9-nautical mile line was a difficult matter[119]. Did you draw the line strictly from the coast or from immediate offshore islands? The question was considered in more detail in preparing for the 1930 Convention.

27. [Show MI, Vol. 4, p. 64.] Once again, there was no question that any third State may have an interest in the matter. I refer you to the detailed Admiralty memorandum of July 1927

---

[117] Memorial of Malaysia, Vol. 2, Ann. 29.

[118] Memorial of Malaysia, Vol. 5, map 25.

[119] See Secretary Hay's letter of 10 December 1904, Memorial of Malaysia, Vol. 3, Ann. 65.

which said "any territory which cannot be shown to be British is definitely American"[120]. So the question was whether the territory was British or American. That memorandum is in your folders as tab 38, and the memorandum attached a map which you can see on the screen. That map is also in tab 38. It is a map cutting which was prepared by an official trying to work out what the implications of the change would be. The memorandum went on to discuss how to interpret the 1885 Protocol — this is tab 39 — for example, in relation to Bum Bum Island off Semporna. Was that to be taken as part of the coast, or was that an offshore island? There is only a narrow channel between Bum Bum Island and the coast. The memorandum expressly discussed the effect of the negotiations on the prospective treaty on the Ligitan Group. Because the attached map cutting on the screen is not very clear, we have reproduced the key lines on a modern map, so the map you now see transposes the lines from the 1927 map on to a modern map. What you can see, the continuous red line is the 9 nautical miles line drawn from the coast and the dashed line is the line that would be drawn if you took islands within the 3-mile territorial sea as providing the base for the drawing of the line, and those are map bases, that is the explanation of the red lines. This map shows that the British side — this was an Admiralty memorandum — certainly proceeded on the footing that the Ligitan Group was affected. The question was whether you applied the 1885 Protocol strictly from the coast itself or not. Of course, the line in the 1895 Protocol, the 9-nautical-mile line, went straight back to the Sulu grant; it is a clear line of continuity. Now, you do not need to decide the question of interpretation that was bothering the Admiralty officials in this case, because of the 1930 Treaty. The point I am making is this: in considering that Convention, it is clear that careful consideration was given precisely to this effect on the Ligitan Group. In the Admiralty's view, the Ligitan Group was involved. The memorandum and the attached map cutting make this quite clear. [End tab 39]

28. In a further letter from the British Admiralty to the Foreign Office in November 1927, the author compared the proposed 1930 Treaty line with what he described as "the temporary boundary which formed the basis of the provisional agreement of 1907". That letter is tab 40 in your folders. I refer in particular to paragraph 2 of the letter, which reads: [Show text]

---

[120] Memorial of Indonesia, Vol. 4, Ann. 123 (p. 235 of the original document).

> "2. A comparison of the proposed definitive boundary . . . will show that this line is not unduly favourable to United States interests. Even taking that interpretation of the 9 mile limit which is most advantageous to the British North Borneo Company, the balance of gain and loss involved in accepting this line would be as follows:
>
> *The United States* would receive Great Bakkungaan Island, which may be claimed as belonging to British North Borneo.
>
> *British North Borneo* would receive Buaning, Lankayan, Mantatuan, Mataking and the Ligitan Islands, to none of which she has any valid claim."[121]

There is no suggestion in the record whether the Panglima of Great Bakkungaan Island welcomed this: he may have been the son of the Panglima to whom Lt. Boughter gave his celebrated law lecture back in 1903. One can just imagine the scene. Lt. Boughter was quite sure the Panglima had understood his lesson — and all lecturers are quite sure that their audiences understood the lesson. As a result of that analysis the Admiralty's conclusion was that the Treaty line was acceptable. And again you can see explicit consideration of the Ligitan Group.

29. On Tuesday Mr. Bundy referred to a statement by the United States that the islands affected by the 1930 Treaty were (1) the Turtle Islands and (2) the Mangsi Islands[122]. Of course, these islands were affected by the Treaty, they were returned to the Philippines, but it is not the case that they were the only islands affected, as the above British statements, based on careful study, show. It is true that the United States evinced no interest over the more southerly islands, which from its point of view were very minor features. Those islands had evidently not been raised in the internal debates in the Philippines, which had focused on the Turtle group. I am afraid that when States come to make treaties, they tend to think it is more blessed to receive than to give. The United States focused on what the Philippines would receive under the 1930 Treaty, not what it would give — and in the political context of the time that was understandable. Any discussion of a *quid pro quo* would have made the task of sowing the 1930 Convention in the Philippines only that much more difficult.

30. But even if the United States had forgotten about the small islands south-west of Sibutu, which the Admiralty had not, the effect of the 1930 Treaty was clear. The United States was limiting itself to islands to the east and north of the 1930 Treaty line, and it thereby necessarily relinquished its claims over islands covered by the 1907 Exchange of Notes which lay to the west

---

[121] Counter-Memorial of Malaysia, Vol. 2, Ann. 3.

[122] CR 2002/29, p. 13, paras. 70, 71, 72 (Mr. Bundy); p. 15, paras. 75, 78 (Mr. Bundy).

and south of the line. On either view, the effect of the 1930 Convention was to withdraw the United States claim to title over the Ligitan islands in favour of Britain.

31. The 1930 Convention was published, as were the annexed maps. No State protested. Again, one is driven to ask, *where were the Dutch?* For nearly four decades afterwards, no State made any claim to any of the affected islands.

Conclusion

32. Mr. President, Members of the Court, this concludes a brief presentation of Malaysia's title to the two islands. It may be helpful if I summarize graphically the territorial effect of the successive transactions from 1878 onwards, which are at the base of the present territorial status quo.

33. We start with the situation in 1878, following the Sulu grant. You can see on the screen, and in tab 41 in your folders, the area granted by the Sultan to Messrs. Overbeck and Dent on behalf of the future Company. You can see the area retained by the Sultan which was then claimed by Spain by reason of Sulu's capitulation to Spain in 1851. Of course at this stage Spain did not recognize any British claims to Borneo.

34. Now let us look at the situation following the Madrid Protocol of 1885: this is tab 42. The BNBC has by now been given its Royal Charter. It is a legal entity; it has established its administration. The town of Semporna is about to be created. Spain recognizes, by the Protocol, British authority over the area covered by the Sulu grant — that is, the area within 9 nautical miles of the coast. Britain in turn recognizes Spanish authority over the islands outside the 3-marine-league line. So that is the situation as between Britain and Spain — it is perfectly clear. The dispute as between British North Borneo and Dutch territory has also by now crystallized: the Dutch claim is made in 1879. It stops at Batu Tinagat, it does not encompass any point further east than that. So at this time the dispute has crystallized, and the two islands are not part of British North Borneo.

35. Now let us look at the situation following the 1891 Boundary Convention: this is tab 43. The area of overlapping claims between Britain and the Netherlands "in Borneo" has been partitioned. Sebatik is divided along the 4° 10' parallel. Even if an allocation line ran out to sea

more than 40 miles to the east (and Professor Cot has shown you that it did not), it could not have affected territories belonging to a third State, Spain.

36. Now we have the situation following the voyage of the *Quiros* in 1903: this is tab 44. By the Supplementary Convention of 1900, Spain has ceded all of its outlying islands in the region to the United States: there was an inner line and then the Supplementary Convention covered all the other islands, so the United States was the complete successor to Spain in respect of all of the Philippines islands. The *Quiros* has visited the islands beyond the 3-marine-league line from the coast of North Borneo, and has planted plaques claiming those islands for the United States, even though they are administered by the BNBC. The *Quiros* starts this on the basis of earlier legal advice from Secretary Hay. The claims are shown in the United States Hydrographic Office map of 1903 — and you can see the line from the 1903 Hydrographic Office map on the screen, encompassing Sipadan and Ligitan. Great Britain and the United States are discussing what to do, given that as the United States acknowledges, the BNBC is in *de facto* occupation of the islands.

37. These discussions occur between 1903 and 1907, and their effect is shown as tab 45. Great Britain accepts that it cannot argue against its express recognition in 1885 of the 3-marine-league line as the limit of BNBC entitlement — so it accepts the United States legal position. Instead, it argues for a lease of the islands. The United States agrees not to press its claims but to reach an agreement with Great Britain — so it produces the second edition of the Hydrographic Office map with an express proviso. There is no question of any Dutch claim: the islands are either British or American. Eventually the parties agree on a permissive occupancy from year to year. The islands concerned are identified by the red line on the map annexed to the Exchange of Notes of 1907, the Durand line as it is called, because it comes from Ambassador Durand's letter of 1906. That letter, in turn, referred back to Governor Martin's letter of 1903. The line goes down to 4° N. Clearly, Ligitan and Sipadan are affected by that line, they lie directly to the east of it. As a result of the 1907 Exchange of Notes the *de facto* situation is regularized, but the United States can ask for the return of the islands on one year's notice, without having to pay anything.

38. In the 1920s it does so, as a result largely of political agitation in the Philippines: but there are amicable discussions between the two States and the situation is resolved by a new line,

that is the line drawn by the Convention of 1930, which you can see [illegible]. That line settles the issue of sovereignty. All the territory to the east and north of that line is American, all the territory to the south and west of that line is British. That remains the situation in 1946, when the BNBC at last departs the scene and North Borneo becomes a British colony. It is the situation in 1963 when Sabah joins Malaysia. It is the situation today.

39. That is the truth of the matter, historically attested. A series of acts no doubt, difficult to explain perhaps to the Panglima of Bakkungaan, but one can explain them if one works one's way through them. Each is clearly recorded — they are not at all mysterious. The mystery is how Indonesia's claim could have survived all this. Where were the Dutch? The Dutch had no claim. If during this whole history they had no claim, then they had no title. And Professor Schrijver will now show you, with your permission, Mr. President, that the Dutch never made a claim. The reason they were not thought of at the time is that they had no interest. The Dutch never asserted a claim to the islands east of Sebatik. In 1945 there was nothing for Indonesia to succeed to.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Professor Crawford. Je donne maintenant la parole au professeur Schrijver.

Mr. SCHRIJVER: Thank you, Mr. President, Members of the Court.

DUTCH PRACTICE AFTER THE CONCLUSION OF THE 1891 BOUNDARY CONVENTION

Introduction

1. I shall now deal with the Dutch practice following the conclusion of the 1891 Boundary Convention between Great Britain and the Netherlands. I shall demonstrate that the adaptations made to the contract with the Sultan of Bulungan confirm Malaysia's position that the islands of Ligitan and Sipadan were not included in the territory of Bulungan.

2. I shall also briefly examine the few sporadic examples of Dutch ships passing through the area, which certainly do not in any way constitute the exercise of territorial jurisdiction in the area. Lastly, Mr. President, my presentation will relate to internal Dutch deliberations during the 1920s

on the absence of a maritime boundary. This provides once more evidence that the islands of the Ligitan Group cannot be considered to have belonged to the Netherlands East Indies.

The local agreements after 1891 with Bulungan confirm the lack of any title to the islands

3. First, I would like to take up the issue of the local agreements after 1891 with Bulungan. Shortly after the conclusion of the Boundary Convention in 1894, the Dutch Government reported to Parliament that the new agreement of 1891 had made it necessary, among other things, to revise the definition of the area of Bulungan, as attached to the 1878 contract with the Sultanate, in order to bring it into line with the newly-agreed boundary line.

4. The previous year, following consultations with the administration of Bulungan, this had resulted in a supplementary agreement on boundaries of Bulungan and islands belonging to it, and this came to replace the 1878 definition of the area[123]. You will find the text under tab 47 of the judges' folders. This new official description of the boundaries was signed on 19 June 1893 by Mr. Joekes as the Dutch Resident, and the chief colonial officer of the Southern and Eastern Division of Borneo, and the Sultan of Bulungan. May I emphasize, Mr. President, its title: "Description of the Boundaries of the Territory of Boeloengan, and List of the Islands Belonging Thereto". Let us now see whether the names of Ligitan and Sipadan appear in this Description designed to implement the 1891 Boundary Convention, including the 4° 10' line referred to in Article IV. [Project relevant part of the 1893 text] As you can see on the screen the Description provides the boundaries of the territory of Boeloengan:

> "The Islands of Tarakan and Nanoekan and that portion of . . . Sebatik, situated to the south of the above boundary-line, described in the *Indisch Staatsblad* of 1892, No. 114, belong to Boeloengan, as well as *the small islands belonging to the above islands*, so far as they are situated to the south of the boundary-line last mentioned."

5. Hence, an explicit reference has been made, once again, to the small islands belonging to Tarakan, Nanukan and the southern part of Sebatik. [Stop projection text and now show sketch-map with the islets.] As shown yesterday — and I will briefly reiterate now — the location and names of these islands were known[124]. As you can see and also can find under tab 48 of your

---

[123] See Memorial of Malaysia, Vol. 3, Ann. 54.

[124] Reply of Malaysia, insert 4.

folders, these small islands are in the proximity of the three larger islands referred to in the Supplementary Agreement: Tarakan, Nanukan and Sebatik. The small islands clearly come within the scope of the phrase "belonging to". Similar wording was used in the earlier agreements of 1878[125].

6. Hence, in 1893 what was called a new "Description of the Boundaries of the Territory of Boeloengan *and List of the Islands Belonging Thereto*", officially signed, was drawn up, with a view to bringing it into line with the 1891 Boundary Convention. Obviously, this important occasion was not used to refer to any new islands over which Bulungan or the Netherlands claimed to have territorial jurisdiction. The reason is simply because there were none. [End of graphic]

The occasional Dutch naval activities in the area were not exercises of territorial jurisdiction

7. I would now like to proceed to reviewing whether occasional Dutch naval activities in the area could be interpreted as amounting to exercises of territorial jurisdiction. Indonesia has relied for its case on the voyages of a number of Dutch ships off the coast of north-east Borneo. But what do these few cases of Dutch naval activities after the drafting of the Convention in 1891 actually amount to?

8. There was first of all the joint expedition of the British ships *Egeria* and *Rattler*, on the one hand, and the Dutch ship *Banda* on the other. During the period of the 20 May-21 June 1891 they jointly fixed the exact points at which the 4° 10' N parallel crosses the coasts of the island of Sebatik. As Professor Cot noted this morning, the ships' commanders also had a map drawn up showing the results of their work. In the precise report of the *Banda*, the Dutch ship, there is no question of any reference to islands in the open sea, to a maritime boundary or to an allocation line further east, let alone a reference to the islands of the Ligitan Group. Nor is there any reference in the subsequent correspondence of the British authorities, the Dutch Navy Commander and the Dutch Foreign Minister when they exchanged the reports of their respective surveying vessels[126].

9. Both Indonesia and Malaysia commented on the surveying activities by the Dutch ship *Macasser* in 1903 as initially reported and discussed by Malaysia in its Memorial. [Project 1905

---

[125] Memorial of Malaysia, Vol. 2, Ann. 11; Memorial of Malaysia, 7.5-7.6.

[126] See Memorial of Indonesia, Vol. 3, Ann. 80 and Reply of Malaysia, paras. 2.29-2.42.

map] These surveying activities of the *Macasser* were conducted in "British North-Borneo, 21-27 October 1903", as the Dutch Commander Van Straaten recorded in his report[127]. These activities in British North Borneo resulted in the 1905 map of the "East Coast of Borneo: Island of Tarakan up to the Dutch-English Boundary"[128], which you now see on the screen, also in an enlargement, and which is also included under tab 49 of the judges' folders. And this Dutch-British boundary line stops, in accordance with the 1891 Convention, on the east coast of Sebatik. It is perhaps somewhat difficult to see from a distance, but it is a fact which you may also wish to check in our Counter-Memorial. This is also exactly the same on the updated 1915 version of the map (also under the same tab 49 in your folders) to which Indonesia refers in rather general terms in its Counter-Memorial[129]. Indonesia now argues that this map is not a map but a nautical chart, and that such charts usually do not depict sovereignty over islands. However, how can the boundary line on Borneo be explained? How can the boundary line on the island of Sebatik be explained? [stop projection map]

10. Furthermore, Professor Soons made the proposition that by publishing and maintaining updated nautical charts the Dutch Government showed that it continued to regard this task as its responsibility to ensure safety of navigation. Mr. President, Members of the Court, is this really proof of sovereignty? Did the Netherlands claim sovereignty over all islands in the seas and oceans for which it happened to publish nautical charts?

11. Subsequently, we have a 1910 patrol by the Dutch ship *Koetei* in St. Lucia Bay. This ship indeed cruised south of Sipadan, which it finally sighted on 30 September 1910. However, as Malaysia stated in its Reply, when the ship was conducting its surveying activities in the neighbourhood of East Nunukan and Sebatik, the logbook noted the ship's arrival in the waters "at the boundary line"[130]. I repeat, Mr. President: "at the boundary line". In 1910, the *Koetei* anchored off the coast at this boundary line and there it was decided who would be in charge of the watch. Subsequently, the *Koetei* evidently passed this point and passed through the St. Lucia Bay,

---

[127] See Memorial of Malaysia, Vol. 3, Ann. 64; Memorial of Malaysia, Vol. 1, 7.5-7.6; Reply of Malaysia, 3.24 and Counter-Memorial of Indonesia, Vol. 1, 7.50.

[128] Counter-Memorial of Malaysia, Vol. 2, maps 2 and 3.

[129] Counter-Memorial of Indonesia, para. 7.50. The 1905 hydrographical map and its 1915 update are reproduced in Counter-Memorial of Malaysia, Vol. 2, maps 2 and 3.

[130] See Reply of Malaysia, para. 3.25 and Ann. 2.

including the area near Sipadan on 30 September 1910. Obviously, this is another example of Indonesia confusing transit passage and the surveying of an area with exercising jurisdiction over territory.

12. The next and final incident was indeed what Indonesia in its Counter-Memorial portrayed as "the highly significant *Lynx* expedition" in November 1921[131]. Professor Soons called it this week "the most striking example of Dutch acts of sovereignty", and we could all note that he spoke with great excitement and enthusiasm on the voyages of the *Lynx* and especially the flights over the islands[132]. Yet, is the *Lynx* voyage really the trump card Indonesia pretends it to be for its claims to the islands of Ligitan and Sipadan? Was my distinguished colleague and friend not carried away by this single story?

13. The *Lynx* was engaged in combating piracy and sought contact on this issue with the British authorities. The relevant part of the *Lynx* report makes frequent reference to the *Sulu islands, Sulu people, Sulu pirates, Sulu Archipelago*. You can read at least five references to the *Sulu Islands* and as many as 11 to *Sulu* as such in the copy of the *Lynx* report Indonesia was kind enough to make once again available this week in its judges' folders (tab 33). By contrast, Mr. President, you may also wonder how many times did the *Lynx* Commander make a reference to the 4° 10" N line in his report. The answer is: not one single time. As reported in the Counter-Memorial of Malaysia, the *Lynx* voyage gave rise to extensive discussions among the Dutch authorities as to what the most logical or desirable territorial boundary east of Sebatik could be[133]. I shall address these internal Dutch deliberations in a moment.

14. But first I would like to conclude at this stage that while the Dutch colonial administration of Bulungan spanned a period of nearly 100 years, we are talking here of just a handful of cases where Dutch ships reportedly were in the neighbourhood of Sipadan and Ligitan, for purposes of taking bearings, suppressing the slave trade or combating sea-piracy — all quite common activities of any maritime power in those days. Moreover, these activities were often

---

[131] Counter-Memorial of Indonesia, Vol. 1, pp. 81-82, para. 7.51.

[132] CR 2002/28, p. 34, para. 15.

[133] Counter-Memorial of Malaysia, paras. 4.10-4.18; Reply of Malaysia, paras. 3.27-3.29.

carried out in co-ordination with other naval powers in the region without having any implications for sovereignty.

15. The exercise of territorial jurisdiction or defence is quite another matter than surveying or hunting for pirates. Malaysia has not found the slightest evidence that either the Sultan of Bulungan or the Government of the Netherlands East Indies was involved in the exercise of territorial jurisdiction or defence of the islands. On the contrary, we learnt that the Sultan of Bulungan did not even possess praus, let alone the capacity to exercise naval power. The prevailing view in the Netherlands, as demonstrated in an 1880 parliamentary report, which was also discussed earlier by Professor Cot, reached a point where it was highly doubtful that the Netherlands had any rights to block other powers from establishing settlements in this area, especially since expansion of the already over-extended colonized area would be beyond its power[134].

16. Indonesia plainly admitted in its first round that "the report of the commander of the *Lynx* is the only such report that Indonesia has been able to retrieve from the colonial archives in the Netherlands, or for that matter, Indonesia"[135]. Indonesia lamented the lack of surviving reports in the archives of the Commander of Naval Forces in the Netherlands East Indies due to war damage in March 1942. Apparently, what Indonesia meant to say is that it could not find any other reports helpful to its case. This is confirmed by Malaysia's meticulous search in the General State Archives of the Netherlands. These archives do not only still contain dozens of logs — in somewhat dusty boxes — but also a list of maritime activities of Dutch ships in the Netherlands East Indies from the Dutch naval ministry. Moreover, Indonesia failed to report the existence of a huge archive of the Netherlands East Indies twentieth century administration, located in Bogor. In all these sources, which definitely still do exist, both Parties have been unable to find any other case besides that of the *Lynx*.

---

[134] Memorial of Malaysia, Vol. 3, Ann. MM 41.

[135] CR 2002/28, p. 38, para. 22.

Internal Dutch deliberations during the 1920s on a maritime boundary east of Sebatik

17. Mr. President, I would now like to turn to the issue of internal Dutch deliberations during the 1920s on a maritime boundary east of Sebatik. During the early 1920s, concern arose regarding intrusions into Dutch territory by Bajau people from the Philippines who reportedly were engaged in sea piracy. As discussed earlier, in November 1921 the Dutch torpedo boat *Lynx* patrolled the area, carrying one seaplane. On this, and later occasions, the question arose as to what should constitute the maritime boundary between the Netherlands East Indies and British North Borneo. These deliberations lasted for five years and are well documented[136]. However, on no single occasion was any reference made to the impact of a maritime boundary on the status of the islands of Sipadan and Ligitan or of their surrounding territorial waters.

18. We were happy to learn from Indonesia's Reply that it is fully aware of these discussions. Indonesia acknowledges that Malaysia provided an accurate description of these internal Dutch discussions[137]. However, we were surprised to learn that Indonesia identified them as "totally irrelevant". Why, Mr. President, were we so surprised?

19. First of all, Indonesia appears to neglect totally that these discussions were triggered by the activities of the Dutch ship *Lynx* in the area, not those in the territorial waters of Sebatik but those in the neighbourhood of Sipadan. It was because of this expedition that the Dutch navy saw fit to raise questions about a maritime boundary. Mr. President, is that a totally irrelevant fact?

20. Secondly, we were perplexed because a series of Dutch officers addressed the issue of a maritime boundary explicitly in their reports. The various options under discussion for determining the boundary east of Sebatik are now on the screen and also under tab 50 of your folders. There is, at this late stage, no need for repetition, but, Mr. President, is it totally irrelevant that in 1922 the Commander of the Navy preferred a line perpendicular to the boundary line at the point where it meets the coast of Sebatik rather than the continuation of the 4° 10' N line?

21. Thirdly, if Indonesia is right that the 4° 10' line extends into the open sea, *quod non*, is it not strange that nobody referred to the existence of such a line during these extensive deliberations covering the period 1921-1926? Not the Commander of the Navy. Not the Governor-General of

---

[136] Counter-Memorial of Malaysia, paras. 4.10-4.18.

[137] Reply of Indonesia, pp. 53-54.

the Netherlands East Indies. Not the Legal Adviser of the Ministry of Foreign Affairs. Not the Minister for Foreign Affairs. Not the Minister of Colonies. Is that not peculiar? Mr. President, Members of the Court, is that "totally irrelevant"?

22. Fourthly, is it "totally irrelevant" that in 1922 and 1923 the Resident, the chief colonial officer in this part of Dutch Borneo, reported that in this particular area "there are no islands; only the open sea"[138]?

23. Obviously, the various Dutch authorities did not regard the 4° 10' N line as an established maritime boundary. Nor as an allocation line. On the contrary, examination of the discussions confirms that the main, if not sole reason for the 4° 10' N line on Sebatik was to provide access to the respective coastal areas to the west and north-west of this particular island.

24. The final decision of the Dutch Minister of Colonies, in October 1926, was, therefore, that a fixing of the boundary line between the Dutch and British territorial waters was not urgent. The Dutch were anxious not to annoy the British and decided to let sleeping dogs lie. The Dutch Minister of Colonies sighs: "The matter can hence be left in abeyance."[139]

Conclusions

25. Mr. President, distinguished Members of the Court, in sum, the islands of Sipadan and Ligitan did not form part of the Sultanate of Bulungan and were never owned or claimed by the Netherlands. The mere fact that the torpedo boat *Lynx* made a stop at Sipadan in November 1921 in pursuit of pirates operating in that area cannot serve as the basis of a legal claim to sovereignty by a successor State. The very sporadic examples of a Dutch boat sighting Sipadan are totally unconvincing in this regard. Mr. President, passing through or surveying a particular area, even if it is for the sake of combating piracy or the taking of bearings, should never be confused with actual exercises of territorial jurisdiction. However, that is what Indonesia does.

26. Notwithstanding extensive internal discussions during the 1920s among a large number of Dutch officials in The Hague and in the Netherlands East Indies on the maritime boundary in the area, a carefully considered decision was taken by the Dutch Ministers of Colonial Affairs and

---

[138] Memorial of Malaysia, Vol. 3, Ann. 73.

[139] Counter-Memorial of Malaysia, Vol. 2, Ann. 8.

Foreign Affairs in 1926 not to raise the matter of a maritime boundary with Great Britain. It was assumed that the perpendicular line would apply and this was indeed in accordance with the prevailing law of the sea at that time.

27. The sketch-maps show that the Dutch were well aware of the fact that such a maritime boundary would only be of limited length and, moreover, would not extend in the direction of the islands of Sipadan and Ligitan. On no occasion was any reference made to a maritime boundary or an allocation line beyond the territorial waters of Sebatik. What clearer evidence of this can be given than the fact that the Dutch, in fact, preferred delimitation between Dutch and British waters according to the line perpendicular to the coast of Sebatik? If the 1891 Boundary Convention had established a boundary or an allocation line, there would have been no need to discuss a territorial sea boundary line at all.

28. All of this, Mr. President, is not surprising, since no relevant power in the region considered this part of the Sulu region to be under the authority of the Sultan of Bulungan or the Netherlands East Indies. Neither did the Netherlands itself consider this to be the case.

29. Mr. President, this concludes my presentation on the Dutch practice, or rather the absence of Dutch practice, with respect to the islands after 1891. It is our intention to ask you to call upon Sir Elihu Lauterpacht this afternoon to continue Malaysia's presentation. I thank you very much, Mr. President, distinguished Members of the Court, for your kind attention.

Le PRÉSIDENT : Je vous remercie, Monsieur le professeur. Ceci met un terme à la séance de ce matin. Nous reprendrons nos travaux cet après-midi à 15 heures. La séance est levée.

L'audience est levée à 13 heures.

CR 2002/32

International Court of Justice
THE HAGUE

Cour internationale de Justice
LA HAYE

YEAR 2002

Public sitting

held on Friday 7 June 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le vendredi 7 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
	Judges	**Oda**
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne la parole, au nom de la Malaisie, au professeur Sir Elihu Lauterpacht.

Sir Elihu LAUTERPACHT:

EFFECTIVITÉS

1. Mr. President and Members of the Court, it falls to me to respond specifically to the points that Indonesia has made in its opening on the subject of *effectivités*. I shall only touch incidentally on Indonesia's presentation of its own conduct — or lack of conduct. That has been examined by Professor Schrijver. Nor will I be discussing Indonesia's treatment of the oil concessions. They will be considered, together with the maps, by Professor Crawford. My task is to respond to the Indonesian commentary on the conduct of Malaysia and its predecessors. But the fact that the question of the nature and effect of the conduct of the Parties is thus being divided between counsel should not be allowed to suggest that there is any real comparability between the *effectivités* of the two sides. The Malaysian case is a positive one. I will recall the specific and cogent evidence of conduct on the British and Malaysian sides representing the assertion and reflection of their sovereignty. The Indonesian case, by contrast, is essentially a negative one. There is virtually nothing that Indonesia can present in the way of conduct in support of its claim to title. Nothing could demonstrate this difference, nor in the positions of the Parties, more compellingly than the manner in which the subject of *effectivités* was tackled by Indonesia in its opening round of argument. Take the speech of Professor Soons on 3 June. First, under the heading of "Dutch exercises of State functions: the activities of the Royal Netherlands Navy" he spoke of a list of Dutch warships which, as he claimed, "shows that the Dutch Government cared about the security of this part of its possessions"[1]. But when we look at the Annex to the Indonesian Counter-Memorial that he cites in support of this assertion[2], what do we find? A list of names of 30 Dutch warships said to have been "present off the coast of north-east Borneo during the period 1895-1928". Leaving aside the initial four-year period of neglect from 1891-1895, one may well ask, what happened to the period from 1928 onwards to the date of Indonesian independence in

---

[1] CR 2002/28, p. 33, para. 12 (Professor Soons).

[2] Counter-Memorial of Indonesia, Vol. 2, Ann. 32.

1949; and from the date of Indonesian independence to 1969? Did the Dutch and Indonesians lose interest in the area? And how did this presence off the coast of north-east Borneo manifest itself in relation to Ligitan and Sipadan? And in what way so as to reflect Netherlands sovereignty? No evidence has been presented on these points.

2. This sorry list is then supplemented by a reference to the presence in the area of the Netherlands navy ship *Koetei* in 1910 — said to have been "not surveying but patrolling"[3]. Even if this were so, it would not amount to an exercise of territorial jurisdiction. And even if it did, which is scarcely possible, it is not much of a contribution to the Indonesian position.

3. Then we come to the surveying activities of the *Macasser* in 1903, said to demonstrate "that the Dutch had interests there"[4]. But demonstrating an interest by carrying out a survey does not evidence sovereignty. If such could be the case is there any country in the world that could not be subject to a claim of sovereignty by Britain or the United States by reason of their worldwide surveying activities?

4. So, Mr. President, we come to what Professor Soons called "the most striking example of Dutch acts of sovereignty", namely, the visit to the area of the *Lynx* in 1921[5]. Of course, this is "the *most* striking example", because it is, apart from the scanty items already mentioned, the *only* example. And so it was presented in detail, for six pages of transcript. Well let us assume, without for a moment conceding, that the interpretation placed by Professor Soons upon this singular — and by singular I mean sole, as well as extraordinary — voyage is correct. What does it prove? Only that one commander of one Dutch naval vessel is said on one voyage to have treated Si Amil as British, and by implication, Sipadan as not being British. And even so, we must recall, he was careful to keep in touch with the British Resident at Tawau. Could it have been because the *Lynx* commander thought that as he might be sailing in British waters it would be prudent to establish with the local authorities that he was engaged in no more than a patrol seeking pirates?

---

[3] CR 2002/28, p. 33, para. 12 (Professor Soons).

[4] CR 2000/28, p. 34.

[5] *Ibid.*

5. Professor Soons was in due course followed on the subject by Professor Pellet[6]. He began with a disquisition on what he called "the limited pertinence of *effectivités* in the present case". That he should do so is understandable, but the length at which he did so does not establish the correctness of his position, though it does recognize the difficulty that the British *effectivités* pose for Indonesia. In this respect he really did no more than repeat the position of Indonesia already set out in its Counter-Memorial[7] and in its Reply[8]. Malaysia, for its part, has already dealt with these legal considerations in its Memorial[9], and more fully in its Reply[10]. And the fact that it has done so succinctly does not detract from the strength of its position. The Court would not, I am sure, thank me for repeating these arguments now.

6. Nonetheless, a few sentences to recall what Malaysia understands by *effectivités* and their significance in this case may not be out of place at this point.

7. *Effectivités* consists of conduct attributable to a State which evidences its authority in, or in relation to, the disputed territory. The greater the number of *effectivités*, the longer the period over which they extend and the wider the range of governmental behaviour that they reflect, the more significant is their role. Conversely, the less there is of them, the less supportive they will be as evidence of sovereignty.

8. There are two ways in which *effectivités* matter in the present case.

9. First, by their indication of the manner, extent and period in which Malaysia and its predecessors asserted authority over the disputed islands, they support Malaysia's rejection of the Indonesian interpretation of the 1891 Convention.

10. Second, even if, contrary to Malaysia's contention, the 1891 Convention accorded title to Indonesia, the fact that throughout the ensuing 78 years until 1969, and even afterwards, Malaysia and its predecessors actually exercised authority over the islands, and Indonesia did not, means that whatever title Indonesia might conceivably have acquired in 1891 has by now been replaced by Malaysia's title based on the presence and conduct *à titre de souverain* of Britain.

---

[6] CR 2002/29, pp. 17 *et seq.*

[7] Counter-Memorial of Indonesia, Vol. I, Chap. VII, Sec. 1.

[8] Reply of Indonesia, Vol. I, Chap. VII, Sec. 2.

[9] Memorial of Malaysia, Vol. 1, paras. 61-69.

[10] Reply of Malaysia, paras. 5.54-5.64.

11. I venture to recall the reference that I made yesterday, towards the close of my opening speech, to the views expressed by Judge Huber in the *Island of Palmas* case — which I restated in the following brief proposition: "A title based on a peaceful and continuous display of State authority would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority."[11] And, always assuming, though in no way admitting, that somehow the Netherlands acquired title to the islands in 1891, that is exactly what has happened in the ensuing 78 years. I need not repeat that there has been no actual display of State authority by the Netherlands or Indonesia. I need focus only on the peaceful and continuous display of State authority by Britain and Malaysia.

12. And how may I best do that in short compass and without undue or lengthy repetition of what has already been amply demonstrated in the written pleadings? The answer has been provided by Professor Pellet in the lists of *effectivités* that he has produced as Exhibits 49, 50, 51, 52 and 53 in the judges' folders presented by Indonesia on 4 June. Subject to some qualification, they form a convenient and helpful starting point to the present necessary, albeit summary, review of the conduct of Britain and Malaysia. I am grateful to Professor Pellet for his contribution.

13. The first comment on his lists is that they are somewhat inflated. Seemingly, Professor Pellet intends, by loading the lists with items of either no or limited relevance, to diminish the significance of those that are important. If I may demonstrate the limitations of my qualifications in the French language, this is not a case of *"reculer pour mieux sauter"* but of *"sauter pour mieux reculer"*. By exaggeration or rejection, an attempt is made to reduce the significance of what remains.

14. I will not take issue with all those items in the General List relating to the period before 1891. So items 1 to 8 may be discarded. So may items 9 to 13, as being marginal to the issues. But not so items 14 and 15 — the American documents. Although marked by Professor Pellet as lacking all legal relevance, as Professor Crawford has shown, they demonstrate that the islands were never thought of as being Dutch. But they do more than that. Item 15 is the 1903 report on the islands under the sovereignty of the United States lying off the coasts of British North Borneo

---

[11] CR 2002/30, para. 22.

prepared by Lt. Boughter, the Commanding Officer of the U.S. *Quiros*. It concludes with the following paragraph, under the final heading of "Islands of Danawan and Si Amil", which is in any respect supportive of the facts that have been stated by Malaysia:

> "I am informed that the island of Sipadan lying to the southward and westward of Danawan has always been understood by the natives as being apanage of the latter named island whose inhabitants by native custom have enjoyed the monopoly of collecting the turtle eggs deposited there."

So I emphasize the first point, namely that Sipadan was always regarded by those around as being an appanage of Danawan and Si Amil. And then he went on: "Recently Bajaus from other localities have been poaching and complaint has been lodged with the Resident at Lahat Datu." — I emphasize the last words: "complaint has been lodged with the Resident at Lahat Datu". Lt. Boughter was thus noting that the authority to hear a complaint about poaching was the British — the *British* — Resident, an important item of evidence confirming the existence and exercise of British jurisdiction in relation to Sipadan in 1903. Thus, when linked together with the Exchange of Notes between Britain and the United States allowing the British North Borneo Company to continue to administer the islands, these documents form part of the picture of British authority in the islands and cannot properly be classified as having no legal pertinence.

15. Items 18 and 19 are of the same order of significance. They show clearly that in 1910 the British North Borneo Company authorities — the Assistant District Officer of Semporna and the Resident of the East Coast — considered that the resolution of disputes over the collection of turtle eggs on Sipadan was a matter for their concern. The same is equally true of item 21 — the 1916 letter from the Acting Resident of the East Coast at Lahad Datu relating to the grant of a monopoly to collect turtle eggs on Sipadan, the last paragraph of which, with its reference to Ordinance XXX of 1914, shows the relevance of item 20 — an Ordinance or Proclamation of the Governor of North Borneo which was clearly understood to apply to Sipadan[12] but was nonetheless dismissed by Professor Pellet. Equally pertinent are items 22 and 23 which evidence the operation of the licensing system in relation to Sipadan. The applicability to Sipadan of item 24 (the 1917 Turtle Preservation Ordinance) is evident on its face.

---

[12] Memorial of Malaysia, Vol. 4, Ann. 93

16. I could continue to recall the role of these and later documents relating to the collection of turtle eggs which demonstrate the applicability and application of British legislation to Sipadan and the corresponding exercise of British jurisdiction. But that would not by itself meet Professor Pellet's detailed use of his scalpel. I should look at some of his specific comments.

17. There is, he says, no mention of Ligitan. True. But that does not diminish the value of the evidence relating to Sipadan. And if Sipadan was British, so was Ligitan. For one thing, Ligitan appears on the Dutch 1891 Explanatory Memorandum map as lying north of the 4° 10' line. But more important, as I said yesterday, Sipadan and Ligitan are each of them and together part of a group of islands, a social and economic unity. If Sipadan was British and not Dutch, it follows that Ligitan was British and not Dutch.

18. Professor Pellet next observed that the inhabitants of Danawan were not alone in collecting turtle eggs from Sipadan. He said that Bajau from other localities poached the eggs. There is no evidence that the scale of such poaching was significant. In any case what can the fact of theft have to do with the title of the local sovereign? And as we have just seen, poaching was dealt with by the British Resident at Lahad Datu.

19. We are told next that the collection of turtle eggs was a matter of tradition. So it may well be. But that cannot contradict the evidence of the concern of the British authorities with the subject and of the existence and application of British legislation. The tradition was recognized and enforced by those authorities, and disputes concerning it were settled by them. These are classic governmental activities, appropriate to the nature of the situation and the territory.

20. As to the Turtle Ordinance of 1917, Professor Pellet invokes the existence of the First World War as a possible explanation of why the Netherlands administration might have been unaware of it. If at all true, it might explain why they may not have become aware of the Ordinance in 1917. But it does not explain why they did not become aware of it in 1918, 1919, 1920 and each subsequent year of its existence and application. The real explanation of the absence of Netherlands reaction is that the Dutch were not concerned with what happened in Sipadan and Ligitan any more than they were concerned with other developments in British North Borneo.

21. Professor Pellet asks whether one can infer title to Sipadan from the legislative activity reflected in the Turtle Preservation Ordinance. Why not? The enactment of legislation is one of the most obvious and accepted displays of sovereign authority. Surely it is every bit as cogent as, and indeed infinitely more cogent than, the solitary voyage of the *Lyn*[illegible]

22. At this point in his speech, Professor Pellet passed to the material relating to the establishment of the Megapode Reserve in 1932. In so doing he omitted to mention item 26 in his list, the 1922 Report on Commercial Sea Products from the Government of British North Borneo[13]. However, this item should not be so lightly discarded. It states, particularly at page 47, that "the sandy shores of our islands, notably Taganak . . . Turtle Island . . . and Sipadan Island in Sibuko Bay, abound with turtle eggs": "our islands". If, therefore, the ignorance of the Netherlands authorities of the existence of the Turtle Preservation Ordinance had persisted for the whole of the period since 1917, the appearance of this report in 1932 would have put them on notice that Sipadan was regarded by the British as one of "our islands". Or were the Dutch authorities also unaware of this report?

23. Nor, while on the subject of turtle eggs, did distinguished counsel for Indonesia refer to other items reflecting official British activity in relation thereto, although he very properly included the items in his list[14].

24. So I return now to the next item in Professor Pellet's argument: the question of the megapode reserves or bird sanctuaries[15]. As to this, Professor Pellet can find nothing more to say than that there is no evidence of any concrete measure of implementation. It is difficult to understand this criticism. What more is needed in the way of implementation than the notice in Annex 101 that the named islands, including Sipadan, are reserved for the purpose of bird sanctuaries? This was an official Government notice, published in an *Official Gazette*. As for the repetition of Indonesia's comments on the 1935 map showing Sipadan as a bird sanctuary, all that

---

[13] Memorial of Malaysia, Vol. 4, Ann. 99.

[14] See Memorial of Malaysia, 1, p. 67.

[15] CR 2002/29, p. 29.

needs to be said in response has already been said in the Malaysian Reply[16] and need not be repeated here. And I respectfully commend that Reply once more to your attention.

25. However, since we are speaking of evidential maps here, it is appropriate to draw attention to one map that appears to have escaped Professor Pellet's net. It is the 1958 map of the Lahad Datu Police District prepared by S. M. Ross[17]. This shows both Sipadan and Ligitan as falling within that district. Indeed, the district boundary line is also clearly shown on the map as running south-east from Kalampang and extending into the sea to the south of Sipadan. It hardly needs saying that the inclusion of the two islands in the Police District is a further clear indication that Britain considered that it had jurisdiction in both places, as already shown in Lt. Boughter's report 55 years earlier.

26. We come next to Indonesia's comments on the construction and maintenance of what Professor Pellet has chosen to downgrade to *"lanternes lumineuses"* since, in his view, they are not *"phares"* or lighthouses. Nonetheless, he concedes that they are "true *effectivités*", his words: *"véritables effectivités"*, but contends that their significance is very limited. The basis for this contention is a legal argument that the construction of a lighthouse does not prove a wish to act *à titre de souverain*. This may well be so, at any rate when the construction of a light is an act taken by itself, without being accompanied by other evidence of State activity. But here the establishment of the lights at Ligitan and Sipadan are not isolated acts. They are part of a pattern of exercise of State authority appropriate in kind and degree to the character of the places involved; a standard expressed by the Permanent Court in the *Eastern Greenland* case. They cannot be dismissed as legally irrelevant. Their construction was sufficiently significant to merit a mention in a section on the "Development and Maintenance of Navigational Aids" in the Annual Report of 1961 of the Colony of North Borneo[18]. Nor can their relevance be dismissed by an *ex post facto* grant of so called "agreement" to their maintenance some 26 years later, or by saying yet again that earlier Indonesian silence reflected "a difficult political situation", comparable presumably to Netherlands silence regarding the Turtle Ordinance in 1917 due to the First World War.

---

[16] Reply of Malaysia, pp. 73-74, paras. 5.21-5.22.

[17] Memorial of Malaysia, Atlas, No. 18.

[18] Memorial of Malaysia, 4, Ann. 110.

27. And so, Mr. President and Members of the Court, we move towards the conclusion of this section. You will observe that I am saying nothing about the post-1969 *effectivités*. That does not reflect any acceptance by Malaysia of Indonesia's contention that such material is not admissible. I have already made my submissions in this connection and will not repeat them. But the point that matters is that Malaysia's position is sufficiently established by the pre-1969 material. Britain had a good title to the islands which Malaysia inherited. Malaysia has maintained that position. Indonesia has presented no evidence to undermine that title. There is, therefore, no point in taking the Court's time to go over material which has already been sufficiently developed in the written pleadings.

28. I pass therefore to the conclusions offered by Professor Pellet. He argued that the possession of Malaysia did not satisfy three requirements: it was not public; it was not *à titre de souverain*; and it was not continuous. I will not contest the requirements because Malaysia has satisfied them all. Permit me to recall how.

29. As to *publicity*. British presence in the islands or part of the island group, and as administered from the Semporna Peninsula, has always been open and has never been opposed. It does not need to be publicized in every particular. The governmental structure was a matter of public knowledge. It was acknowledged by the fact that the Commander of the *Lynx* on its famous patrol in 1921 thought it appropriate to communicate his intentions to the District Officer at Tawau. Particular legislation was public: Proclamation XXX of 1914; the Turtle Preservation Ordinance of 1917; the Government Notification of 1933; the Notices to Mariners; the North Borneo Fauna Conservation Ordinance (1963). All these were public: so was the 1922 report on commercial sea products from the Government of British North Borneo. This was sufficient publicity — if it had been taken notice of — to make Malaysia's position clear.

30. Was the conduct *à titre de souverain*? Professor Pellet questions the sovereign position of the BNBC in the area. This is really so feeble a point that it deserves no reply. What else could the governmental activity of the company in the area have been, until eventually it ceded its rights to the British Government? And the fact that some of the illustrations of BNBC authority relate to the settlement of private disputes does not alter the sovereign character of the jurisdiction that it exercised during that period.

31. What then about the *continuity* of the exercise of Malaysian authority? The fact that the evidence does not cover every day in every way does not alter the underlying continuity of the administration. Indonesia has produced no evidence to contradict the historical and legal continuity underlying, and implicit in, the specific terms adduced by Malaysia.

32. There is, Mr. President and Members of the Court, a serious measure of absurdity, an inversion of reality, in this attempt by Indonesia to put Malaysia in the position of having to prove its title by reference to a standard of conduct that Indonesia's own behaviour does not remotely approach. If the Netherlands acquired a title to the islands in 1891, it was up to it to maintain it. And to do so by conduct comparable to that which it now demands of Malaysia. But what does the Court get? A close scrutiny of the details of British and Malaysian conduct which cannot conceal the true governmental position. And what does the Court get as regards the conduct of Indonesia? The *Lynx*, the *Lynx* and yet again the *Lynx*.

33. Mr. President and Members of the Court, I respectfully submit that the evidence of British and Malaysian activity — even if taken only for the period to 1969 — is more than adequate to support both Malaysia's interpretation of the 1891 Treaty by reference to the subsequent conduct of the Parties and Malaysia's title on a basis of historical consolidation. It also shows that the Netherlands and Indonesia have done nothing in relation to the islands to maintain their claimed title.

34. I thank you, Mr. President and Members of the Court, for having allowed me once again the honour of addressing you, and I now respectfully request you to call upon Professor Crawford.

Le PRESIDENT : Je vous remercie, sir Elihu. Je donne maintena[illegible]a parole au professeur James Crawford.

Mr. CRAWFORD: Mr. President, my speech will last just slightly less than an hour and I will leave it to you to indicate if you would like to take the coffee break during that period or struggle through to the bitter end!

Le PRESIDENT : Je vous en prie. Commençez, nous verrons plus tard.

Mr. CRAWFORD: Mr. President, Members of the Court.

THE MAPS

Introduction

1. In this final presentation in Malaysia's first round, it is my task to take you briefly through the map evidence, and to deal in that context with the oil licences, before briefly summarizing Malaysia's case. I will show that overall the map evidence provides clear support for Malaysia's claim to the islands — and no specific support for Indonesia. To assist the Court you will find in tab 51 in your folders, a list, in chronological order, of all the maps of the area which are reproduced in the pleadings of both Parties, with references. And, again, the chronological order is helpful. There are 77 maps in total, excluding maps produced specifically for the purposes of the case.

2. I must acknowledge the assistance of members of the Malaysian Department of Survey and Mapping, under their Director of Survey, Mr. Hasan Jamil, for the enormous amount of work they have done in the preparation of the maps. In particular I should like to thank Mr. Tan Ah Bah and Mr. Hasnan Hussin.

3. As the Court will be aware, all maps are not equal. Shakespeare wrote that some men are born great, some achieve greatness and some have greatness thrust upon them[19]. Now whether this is true for men, it is certainly true for maps. Some maps are born great — in particular, those annexed to treaties. These are the category 1 maps, legally the great maps. Then there are maps that achieve greatness, because they are endorsed and put forward by States in the context of international relations as reflecting a boundary, and maybe they are accepted by other States as well, as the Annex 1 map was in the *Temple* case. The Annex 1 map achieved greatness[20]. These are the category 2 maps.

4. And then there are category 3 maps, the miscellaneous maps, the maps that are none of the above, the maps that have no international endorsement at all. These maps have no international status. They are more or less reliable or more or less unreliable depictions, on some scale or

---

[19] W. Shakespeare, *Twelfth Night*, Act 2, scene 5.

[20] *I.C.J. Reports 1962*, pp. 33-35.

another, of something or another. They may be privately published; they may be internal maps which have never been published at all. Thus category 3 maps cover a very wide range. Indeed it is impossible to work much with maps in the context of international boundaries, with maps in this third category, without being impressed — and one might say depressed — at their variability, inconsistency and imprecision on points of detail. This is why, as you have repeatedly said — most recently in the *Namibia/Botswana* case[21] — such maps are never in themselves dispositive, unlike maps in the first two categories, which are or may be. In *Namibia/Botswana*, you quoted with approval a passage of the Chamber in *Burkina Faso/Mali*, where it said that these maps

> "merely constitute information which varies in accuracy from case to case; of themselves and by virtue solely of their existence, they cannot constitute a territorial title, that . . . a document endorsed by international law with intrinsic legal force for the purpose of establishing territorial rights [can do] . . .".

There speaks a Chamber with a lot of experience of looking at maps. The contrast is clear: category 3 maps consists of maps which are, at best, "only extrinsic evidence". They are to be thrown into the pot "along with other evidence of a circumstantial kind"[22]. They have no special status at all. So let me look at the maps under these three categories.

Category 1. The annexed maps

5. I turn to the first and most important category, category 1, the maps annexed to a treaty and endorsed by the treaty as an accurate description of the boundary. As we have shown, the Dutch internal map is not in this category. But of the 77 maps in the record, five are treaty maps: of these three show treaty lines which are, in some way or another, relevant to the dispute.

6. [Tab 52: 1907 map] The first is the map annexed to the 1907 Exchange of Notes between Britain and the United States, which is tab 52 in your folders[23]. I have already described the Exchange of Notes, it provided that the map was an integral part of the agreement. You can see that the red line on the annexed map goes down to 4° N, well to the south of the islands, the location of which was by 1907 securely known as a result of the survey voyages of the *Egeria* and other vessels. All the islands to the south and west of the red line but beyond 9 nautical miles from

---

[21] *I.C.J. Reports 1999*, p. 1045 at pp. 1098-1100 (paras. 84-87), citing the Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, *I.C.J. Reports 1986*, p. 582, paras. 54, 56.

[22] *I.C.J. Reports 1986*, p. 582.

[23] Memorial of Malaysia, Vol. 2, Anns. 23-24, and for the map see Memorial of Malaysia, Vol. 5, map No. 6.

the coast were acknowledged to be administered by the BNBC and to belong to the United States. [End 1907 map]

7. [Tab 53: 1915 map] The second of the annexed maps is that annexed to the 1915 Anglo-Dutch Agreement: it is tab 53 in your folders. Professor Cot has already discussed it. It is inconsistent with Indonesia's position. The red line showing the boundary stops at the east coast of Sebatik. There is no indication on the map, in the agreement, in the *travaux* of anywhere else that the 1915 map was not a complete depiction of the boundary prescribed by Article IV of the 1891 Boundary Convention. The map was carefully prepared, based on a joint report, the Tawao Report, of 1913. If you had asked the authors of the Tawao Report whether their line was a complete and accurate description of the 1891 Convention's provisions — specifically Article IV — they would have said "of course it is, that's what we were sent here to do". And indeed they did say that in paragraph 3 of their Report: "We have determined the boundary between the Netherland territory and the State of British North Borneo as described in the Boundary Treaty . . . as taking the following course . . ." And the course of the boundary was "[t]raversing the island of Sibetik" and it is described from east to west[24]. Not a description consistent with Indonesia's position. [End 1915 map]

8. [Tab 54: 1930 map, "Philippine Islands Southwestern Part"] The third annexed map is that attached to the 1930 Anglo-American Treaty, which is tab 54[25]. As I noted this morning, there were two annexed maps: this is the relevant one. The line shown on the map is not very easy to see, so we have highlighted it in red. According to the Treaty, all the islands to the north and east of the line were part of the Philippines, all those to the south and west were part of British North Borneo. [End 1930 map]

9. [Tab 55: composite map showing combined effect of 3 lines on annexed maps] It is instructive to look at the combined effect of the three annexed treaty maps, the three category 1 maps that are relevant, and you can see this in tab 55. First, the 1915 map, which confirms that the effect of the 1891 Convention is a line stopping at the east coast of Sebatik. Then the 1907 Durand line: all the islands to the west and south of that line and beyond 9 miles from the coast are

---

[24] Memorial of Malaysia, Vol. 2, Ann. 25.

[25] Memorial of Malaysia, Vol. 5, map No. 25.

administered by the BNBC pursuant to the 1907 Exchange of Notes. Then the position is finally regularized by the 1930 Treaty, which takes back to the Philippines some islands further north, in particular the Turtle Islands group — which are in that indentation marked "1930 Treaty" — but definitively leaves the Ligitan Group to North Borneo. This is the legal effect of the internationally agreed maps, the category 1 maps in this case. [End composite]

10. Finally I should mention the map annexed to the 1969 Agreement on Continental Shelf Delimitation[26]. The Parties agree that this map did not delimit any maritime areas off the east coast of Borneo. The reason it did not is that Indonesia had just made its claim to the two islands. Malaysia of course rejected that claim, and the Parties proceeded only to delimit the maritime boundary elsewhere. Evidently the 1969 map does not establish anything for the east coast of Borneo. It was concluded under an express reservation of the competing claims to the islands. Nonetheless, Indonesia attempts to argue that the innominate lines and dots on that map amount to a concession by Malaysia as to the correctness of Indonesia's claim[27]. This is of course absurd: a State does not at the same time vigorously reject a new territorial claim made by another State and immediately sign a map which concedes the claim. Malaysia certainly did not do so.

Category 2. Maps embodying international claims by the originating State

11. Mr. President, I move from the five treaty maps to the second class of maps, the category 2 maps. These are those which, although not agreed between the States concerned or annexed to treaties, are put forward and endorsed *in the context of interstate relations* in such a way as to give them intrinsic legal significance. For example, a map may be used in negotiations by one State to specify a claim against the other State involved in the negotiations, in which case it reflects the limits of the former State's territorial claims.

12. In the present case there are five category 2 maps, and it is significant that they are prepared one by each of the five principal actors reflecting their territorial claims or holdings in the region. Let me take you briefly through them.

---

[26] Memorial of Malaysia, Vol. 2, Ann. 32, and for the map itself, Memorial of Indonesia, Map Atlas, map No. 17.

[27] Transcript.

13. [Tab 56: CMI, Vol. 2 Ann. 22] The first is the map of 1888, which is tab 56. It was sent as an attachment by Count von Bylandt, to his Ambassador in London on 28 July 1889, and it was communicated during the negotiations to the British side[28]. Both the Dutch and the British accepted that the red line drawn on the map reflected the "Northern Boundary of Dutch possessions" in Borneo. There is no question of any claim to island or land territory to the east of Batu Tinagat. All the depictions of the Dutch claim on the east coast, whether emanating from the Dutch or the British, are consistent in showing that the Dutch claims went no further than Batu Tinagat. The documentary record is also entirely consistent with this. [End CMI, Vol. 2 Ann. 22]

14. [Tab 57: United Stages Hydrographic Office Map 1903] The second of these maps has become controversial, and I suppose we may say that it is on the fringes of category 2. It is the United States Hydrographic Office map of 1903, which is tab 57. It shows the Ligitan Group, including Sipadan, as "islands . . . under the sovereignty of the United States of America"[29]. This of course was issued at the same time, though by an independent process, as the voyage of the *Quiros* — the voyage during which both Sipadan and Ligitan were claimed by the United States. Indonesia argues that this map was not formally disseminated by the United States but was in effect withdrawn[30]. I dealt with that argument already, it is only half true: the dissemination of the map was halted, but the United States never retreated from the legal basis on which the map was prepared, as I demonstrated this morning. Moreover the reason the line on this map was put on hold "for the moment" had nothing whatever to do with the Netherlands and everything to do with the BNBC claim to the islands[31]. In the event the British, mindful of the position it had taken in 1885, agreed that the islands formally belonged to the United States[32]. It may be noted that this episode was more explicit than Thailand's concession of French sovereignty by reference to the Annex 1 map in the *Temple* case. There is a further important difference between the two cases. The United States analysis of the situation arising from the transactions subsequent to 1878 was not

---

[28] Memorial of Malaysia, Vol. 3, Ann. 47.

[29] Memorial of Malaysia, Vol. 5, map No. 5.

[30] Reply of Indonesia, paras. 6.33-6.34.

[31] Memorial of Malaysia, paras. 5.27-5.37 and documents there referred to.

[32] Memorial of Malaysia, Vol. 3, Ann. 66.

merely cartographically clear — as the Annex 1 map was cartographically clear. It was legally correct, as the Annex 1 map was not. [End US map]

15. [Tab 58: Durand map] At any event, there is no indication that the United States resiled from the position shown on this map prior to the conclusion of the relevant treaties. That position is confirmed from the BNBC side in the Durand map of 1903, which was annexed, or rather the line on the Durand map was annexed to the 1907 Exchange of Notes which is tab 58. Unfortunately, despite vigorous searching, we have not been able to find the original map which was attached to the BNBC despatch of 13 July 1903 from the company to the British Foreign Office[33]; we have the despatch, but not the map. But all the documentary evidence supports the conclusion that the line shown on the screen is in truth what it says that it is, the "Red line referred to in paragraph 24 of despatch dated 13 July 1903 to Foreign Office"; that was the despatch of the BNBC Governor Martin immediately following the voyage of the *Quiros*. The line depicts the islands actually administered by the BNBC; it also of course depicted their claim. It plainly includes both Ligitan and Sipadan. [End Durand map]

16. I turn now to two more recent maps which the Parties to this dispute, Indonesia and Malaysia, have produced and published in order to depict their maritime claims. Maritime boundaries depend on land boundaries, as you have recently been told, and these maps thus reflect, in the context of inter-State claims, the views of the Parties. Moreover not only are they official maps, they were carefully prepared because the question of maritime boundaries was of huge potential significance to the Parties. They are not just occasional productions.

17. [Tab 59: Indonesian continental shelf map; enlarge North Borneo segment] The first of these is the map annexed to Indonesian Act No. 4 of 18 February 1960, depicting the new Indonesian archipelagic baselines claim[34]. The map is on a scale of 1:14 million, but it is a summary of a process of careful preparation and study, and the proclamation of Act No. 4 was rightly treated by Indonesia as marking an important moment. You can see there are a large number of identified turning points, each one of which of course was separately calculated. It was the product of a careful process of preparation.

---

[33] Memorial of Malaysia, Vol. 3, Ann. 59.

[34] Memorial of Malaysia, Vol. 4, Ann. 107; Memorial of Malaysia, Vol. 5, Map No. 7.

18. Now as we know from Professor Pellet, on the east coast of Borneo, the baselines shown are inconsistent with any territorial claim to islands such as Sipadan and Ligitan. If those islands had been claimed, the baselines would have been quite different: [add red line] there would have been red lines as now shown, superimposed on the map, drawn from Turning Point 37 sharply north-eastwards up to the islands. The point at the end, presumably on Ligitan, would have been Turning Point 36[35], whereas Turning Point 36, in fact, is on Sebatik.

19. Professor Pellet sought to excuse Indonesia for its failure to draw that line. He argued that that a line would not follow the general direction of the coast and would therefore violate the law of the sea[36]. But there is absolutely no indication that that was the reason for Indonesia's not using Ligitan and Sipadan in 1960. Indonesia will have in its archives the information about the decisions as to the turning points; it has produced nothing to support Professor Pellet's assertion. And just a quick look at the baselines indicates that the assertion is, well, the sort of thing an advocate would say when in difficulty. [End tab 59]

20. [Tab 60: Show selected aspect of 1960 map] You can see on the screen, and in tab 60, another segment of the 1960 baselines. It covers an area further to the east in the region of Turning Points 70 to 73. You can see there is no indication of restraint here, and we could have chosen a number of other examples. In short, we may presume that the reason Indonesia did not draw its baselines to Ligitan was not restraint, but that it did not claim the two islands in 1960. [End Indonesian map]

21. [Tab 61: Malaysian continental shelf map 1979] Finally we have the 1979 map, "Territorial Waters and Continental Shelf Boundaries of Malaysia", which is tab 61[37]. It shows territorial sea and continental shelf boundaries in general terms including, of course, those drawn around Sipadan and Ligitan. Again it is unequivocal. By contrast, Indonesia has never, at any stage, with or without disclaimer, produced a single map showing the two islands as Indonesian. Nor did the Dutch ever do so, as I will demonstrate in a moment. [End Malaysian continental shelf map 1979]

---

[35] See Memorial of Malaysia, Insert 10.

[36] CR 2002/29, pp. 54-55, paras. 12-17.

[37] Memorial of Malaysia, Vol. 5, map No. 19.

22. Mr. President, Members of the Court, I have taken you through five maps in category 2, reflecting the claims or holdings of the Parties. The 1888 Dutch map, reflecting the eastern limit of its claim. The United States map of 1903, reflecting the legal claims made during the voyage of the *Quiros*, even though they were put on hold pending negotiations with the British. The Durand line, reflecting the view of the BNBC's administration. And the modern, considered maritime claim lines of Indonesia in 1960 and Malaysia in 1979. So there are eight relevant maps in the first two categories of maps. Each one of them reflects the Malaysian position in this case. Not one of them reflects the Indonesian position.

The category 3 maps

23. Mr. President, Members of the Court, that leaves another 67 maps in the record and we have approximately two hours. The maps fall into the residual category, category 3. They are simply indications of a general kind. The vast majority of them show the islands as Malaysian, or do not show the islands at all. A few are equivocal. One, the British map shown by Ms Malintoppi on Tuesday[38], appears to show Sipadan as Indonesian and Ligitan as Malaysian. It contains a disclaimer. It is completely out of line with the other maps and with the positions of both Parties in the case, and there is nothing more to be said about it.

24. [Tab 62: Internal Dutch map (1891) extract] Much more important for Indonesia in this case, of course, is the internal Dutch map of 1891. Indeed it has been singled out by Indonesia as the linchpin, the centrepiece, the focal point of its case. Indonesia has certainly attempted to thrust greatness upon this map!

25. You can see the relevant part of that map yet again on the screen, in tab 62 in your folders. It actually has not been carefully analysed. There are three points to be made about it, geographical, legal, historical.

26. First, the *geographical* point. You can see that the line out to sea stops just after "P. Maboel", that is Maboel Island, which the map attributes to North Borneo. No island is shown south of the line, or south of the extension of the line that would be if the line was extended further east, except of course for the southern portion of Sebatik itself. The map does not show Sipadan.

---

[38] CR 2002/29, p. 49, para. 60.

But it does show a small unnamed island with a fringing reef well to the east and slightly to the north, it is ringed on the map now. This is Ligitan, with part of the star-shaped reef. It is exactly where the 1890 British Sailing Directory put it, at "latitude 4° 12½' N, longitude 118° 54' E"[39]. The Sailing Directory, which is in the Malaysian Counter-Memorial, is by far the best contemporary evidence of what was generally available knowledge as to the location of the islands. The *Egeria* did not reach Ligitan and conduct a detailed survey until the following year. The Sailing Directory incidentally does not give the co-ordinates of Sipadan. Someone who had the internal Dutch map and the Sailing Directory would think that the two islands belonged to North Borneo; one of them is north of 4° 10', the other one, there are no co-ordinates. Someone armed only with the internal map would think that no island was attributed to Dutch Borneo by the line, and that the unnamed island was attributed to North Borneo. As I have said, the unnamed island is Ligitan.

27. Thus the internal Dutch map locates one of the disputed islands to the north of 4° 10' and does not show the other one. The line on the internal Dutch map *does not attribute any islands to Dutch Borneo*. It is only in hindsight that we know that both islands are south of 4° 10'. The negotiators gave no indication of knowing that. In 1891, as I have said, the British surveys, which accurately located the islands, had not yet been carried out. So that is the geographical point. [End internal map]

28. [Tab 63: show first draft of the internal Dutch map] The *legal* point my colleagues have already made. Both in its first draft and in its final draft, this is an internal map. It was prepared after the conclusion of the Treaty by someone on the Dutch side. We have the first draft of the map[40], which shows an even shorter line, stopping much further west. You can see that on the screen and in tab 63. Of course the internal Dutch map is not part of the *travaux préparatoires*. The best a later, well-informed Dutch official could say was that it was "not impossible" that it was known to the British[41]. "Not impossible": it is a stark contrast with "officially known". In fact the British had picked up a copy, as we know. But it was not officially communicated and there was

---

[39] See Counter-Memorial of Malaysia, para. 1.3.

[40] Memorial of Malaysia, Vol. 1, insert 15.

[41] Counter-Memorial of Malaysia, Vol. 2, Ann. 5.

no obligation whatever on Britain to react to it. But there was nothing to react to. The internal Dutch map did not attribute any islands to Dutch Borneo. [End first draft]

29. And the *historical* point is this: after its brief appearance in the Dutch parliamentary record, the map disappeared even as an internal map, until the 1920s and the discussion over the territorial sea, when it resurfaced. It was at no stage part of the debate, even a Dutch debate — the line out to sea is not mentioned in the Dutch parliamentary proceedings. Still less was it mentioned in any subsequent diplomatic discussions prior to 1969. There was simply no Dutch claim out to sea, which the internal map might or might not support. Thus even if the internal Dutch map graphically supported the Indonesian case — which it does not —, it is as lacking in historical significance as it is lacking in geographical pertinence or legal weight. That map truly has had greatness thrust upon it, but unfortunately for Indonesia it is too slender a thread to bear the weight.

30. Mr. President, Members of the Court, getting rid of those two maps reduces the number in category 3 down to 65. It would be tedious to take the Court through all these 65 maps, and I will not do so. I want only to make three general points.

(a) *The absence of any Dutch or Indonesian map claiming the islands on the basis of the 1891 Convention*

31. The first point is to ask whether the Dutch and Indonesian maps produced since the ratification of the 1891 Convention support Indonesia's case. You will find, at tab 64, a list of all the post-1891 Dutch and Indonesian maps, with references, in chronological order. They cover virtually a century, from 1894 to 1992. There are 15 Dutch maps on that list and seven Indonesian maps, a total of 22.

32. I will let you look at them for yourself, but not one of these 22 Dutch and Indonesian maps shows the two islands as belonging to Dutch Borneo or Indonesia — not one. Some do not show the islands at all. Those that do show the islands, overwhelmingly show them as belonging to North Borneo (Sabah).

33. I am just going to take three examples, two from the Dutch period, one from the Indonesian.

34. [Tab 65: 1913 Dutch map: MM, insert 2] The first is the "Sketch-map of the Southern and Eastern Divisions of Borneo", published by the Netherlands Indies Topographical Office in

Batavia in 1913[42], which is tab 65 in your folders. It shows the 1891 boundary stopping at the east coast of Sebatik. Well to the east it shows the Ligitan Group. They are evidently part of the Government of British North Borneo, along with the other maps, though of course by this stage, pursuant to the 1907 Exchange of Notes. [End 1913 Dutch map]

35. [Tab 66: 1941 Dutch map: CMM, map 7] The second of the Dutch maps I want to show you is the last Dutch map in the record. It dates from 1941, and again was published in Batavia. You can see an extract on the screen, and it is tab 66 in your folders. It shows accurately both the 1891 Anglo-Dutch boundary and the 1930 Anglo-American boundary. In between the two boundaries it shows the Ligitan Group. The whole complex of islands off Semporna is evidently part of British North Borneo. And you can tell this from a nice point of detail. Note that in this Dutch map the Dutch islands have the abbreviation "P." for *pulau*, for example P. Oost Noenoekan. Then look at the islands around Semporna. The abbreviation for them is "I.", for island, thus Sipadan Island. Whoever drew that map in 1941 wanted to distinguish between the Dutch islands with *pulau* and the British islands with the abbreviation "I." and did so in the clearest typographical way, on a map which clearly and correctly represented the boundary situation in the region. This is the Dutch heritage. [End 1941 map]

36. [Tab 67: 1976 Indonesian map: CMM, map 10, detail] Then let me take you to one of the six Indonesian maps in the record, which is the map entitled "Bandar Seri Begawan", published in Jakarta in 1976, after the dispute had arisen. It is tab 67. It does not contain a disclaimer. You can see the 1891 boundary across Sebatik, stopping at the east coast — although it is not terribly visible here, I can assure you that it is there as a line of crosses. You can see the 1930 Anglo-American boundary, which is now the boundary between the Philippines and Sabah. You can see the cluster of islands forming the Ligitan Group. Would anyone looking at this map have thought that two of these islands were part of Indonesia? Of course not. [End tab 67]

37. Mr. President, Members of the Court, the conclusion to be drawn from the 22 Dutch and Indonesian maps in the record is that the two islands were never thought of or claimed to be part of

---

[42] Memorial of Malaysia, Map Atlas, map 1.

Dutch Borneo or, after 1945, Indonesia. That is entirely clear, and it is entirely consistent with the position taken by the Dutch and by Indonesia up to 1969.

38. This needs some emphasis. Indonesia does not claim that anything that has happened since 1945 actually changed the legal situation. It has done its best to argue that nothing could have changed the legal situation. If the Dutch did not own the islands in 1945, Indonesia does not suggest that any event or transaction since then could have changed the situation. Nor was there any event or transaction capable of doing so. But the map evidence confirms that the Dutch did not claim the islands as part of Dutch Borneo before 1945. Indonesia succeeded to the islands and territories of the Dutch East Indies on independence. Those territories did not include the two islands. Indonesia could not succeed to a territorial claim the Dutch never made. It did not have entitlements which the Dutch at no point ever asserted. It succeeded to the Dutch territorial position positively and negatively. It acquired whatever the Dutch had acquired. It failed to acquire whatever they had failed to acquire — and *a fortiori*, it failed to acquire what they had never claimed. It is as simple as that.

Mr. President, it will take me about another half an hour. I am in your hands.

Le PRESIDENT : Continuez, je vous prie.

Mr. CRAWFORD:

(b) *The oil practice of the Parties*

39. The second point I want to make concerns the oil practice of the Parties since independence. Indonesia seeks to use the oil practice to show that it did, and/or Malaysia did not, claim the islands. But the documentary record — which is very slight — does not begin to establish this. In fact there seems to be very little oil hereabouts which is the reason why there is very little documentary record.

40. [Tab 68: MI, map 6.2] There is only one original map in the record dealing with oil concession activity, apart from the continental shelf claim maps that I showed you. That one map is a Malaysian map of 1968, depicting the oil prospecting licences and leases granted on and

offshore of Sabah as a whole[43]. You can see it on the screen. This map does not show any islands at all south of Semporna, and is of a generic character. It is obviously not intended to reflect the territorial position of particular islands which are not depicted.

41. For its part, Indonesia has never issued any exploration licence covering the area of the two disputed islands or anywhere close to them, as Indonesia itself admits and as they portrayed on Tuesday through Professor Pellet[44]. Nor has there been any actual oil activity by either Party in the vicinity of the islands, so far as the record shows. In these circumstances, the position is that neither Party has any relevant oil practice. Since Malaysia has always administered the islands, and Indonesia never has, that leaves the administrative record pretty well where it was, or almost.

42. But you will recall that, whereas the Indone[illegible]n licence area stops not so far east of Sabatik and is nowhere near the two islands and implies no claim to them, the Malaysian licence area cuts right through the territorial sea of Ligitan. Of the two concessions, it is Malaysia's and not Indonesia's which implies a territorial claim to at least one of the islands in dispute. [End map 6.2]

43. But I do not suggest that anything very much turns on this. These were large exploration licences delimited by long straight lines; they do not appear to have had regard to local issues, any more than Yemen's oil practice in the *Eritrea/Yemen* case[45]. What can certainly be said, however, is that Indonesia's licence does not imply any claim to the two islands.

(c) *Maps showing lines in the sea*

44. Mr. President, Members of the Court, I turn briefly to my third general point, which may be called the "lines in the sea" argument. It was made by Ms Malintoppi last Tuesday with great elegance — it is a pleasure to respond to what she said. She pointed out that there are a number of maps showing lines in the sea to the east of Sebatik, and she sought to use these lines to support Indonesia's claim.

45. Before I descend to detail, the first point to note is that Indonesia does not suggest that any of these maps is in itself sufficient to establish its title, and indeed Ms Malintoppi began by

---

[43] Memorial of Indonesia, map 6.2.

[44] See Memorial of Indonesia, map 6.3.

[45] (1998) 114 *ILR* 1 at pp. 108-109 (paras. 416-417).

saying so expressly[46]. She did not suggest that, if the Dutch did not own the islands as the result of the 1891 Boundary Convention, these later maps gave it title. So their significance, if any, is secondary; they are intended to support a title which, as Malaysia has already shown, cannot possibly exist. The reason it cannot possibly exist is that the Dutch did not claim the islands before 1891 or after: the British did not own them before 1930. The 1891 Convention did not give to the Netherlands, and could not have given to the Netherlands, islands the Dutch did not previously claim and Britain did not own.

46. But let me look at the maps showing lines in the sea on their own terms, subsidiary and subordinate as the Indonesian argument appears to be.

47. [Tab 69: map 1] In doing so I will ignore a few early maps that do not focus on the east coast of Borneo. For example, in its written pleadings Indonesia placed some emphasis on this splendid map, which comes from the pleadings in the *Island of Palmas* case. It is tab 69 in your folders. We call this the jumbo jet map, because it reflects a region from Burma down to the north-east coast of Australia — and I can tell you from bitter experience that takes about seven hours to fly in a jumbo jet. The so-called boundary lines east of Borneo, depicted as curved coloured lines on that map of 1881 — they tell us nothing whatever about small islands off the east coast of Borneo. [End map.]

48. Focusing, then, on the maps which themselves focus on the east coast, the first point to make is that, without exception, all the treaty maps and all the formal claim maps which I have analysed, which show a line across Sebatik, stop the line at the east coast. All the category 1 maps, all the category 2 maps.

49. Of the category 3 maps which show a boundary line across Sebatik, it is true that a number show the line continuing out to sea. The problem for Indonesia is that none of the maps actually establishes its case, and this quite apart from the point that, inherently, a category 3 map cannot do so anyway. Let us look at these maps a little more closely.

---

[46] CR 2002/29, p. 36, para. 3.

50. First of all, of course, there is the internal Dutch map and the first draft of that map, which show lines in the sea east of Sebatik, of different lengths. I have already dealt with these and need say no more about them. Even as maps, they do not establish Indonesia's case.

51. Then there is a group of maps showing lines extending a few miles east of Sebatik. Perhaps the authors of these maps thought that one drew the territorial sea by extending the line of the land boundary, though when the Dutch thought about it in the 1920s they came to the contrary conclusion.

52. Let me take two examples of this group; we will call them the short-line maps. I will take one Dutch one and one Indonesian one to illustrate the point.

53. [Tab 70; Ann. 28] The first, which you can see on the screen, is a Dutch administrative map of 1939 showing the administrative district of Tarakan. You will remember the Dutch contracts with Bulungan of 1850, 1878 and 1893, referring to Sebatik, Nunukan, Tarakan and the small islands belonging thereto. Well, here these small islands are, shown clearly on the Dutch administrative map of 1939. The map line goes east, along the 1891 boundary, out to sea for a short distance, about 3 miles, and then turns south and it then follows the curvature of the coast and immediate offshore islands[47]. It is a beautiful, classical depiction of a territorial sea. It depicts the extent of Dutch sovereignty, just before the Second World War broke out. [End Ann. 28]

54. [Tab 71: show CMM, Vol. 2, map 11] And in its turn, Mr. President, Members of the Court, Indonesia took no different position prior to 1969. Indeed, it took no different position in any of its maps at any time. You can see this from the Indonesian map dated 1987, entitled "Land Systems and Land Suitability", which is tab 71. It actually reflects a joint British-Indonesian land survey. You can see that the 4° 10' line crosses Sebatik, goes out a short distance, it is about 3 nautical miles, and then stops. Of course the map does not show any detail to the north or the east; the land survey concerned Indonesian Borneo, not Sabah. There was no survey of Ligitan for land suitability, or of the land systems on Sipadan. The map is inconsistent with the view that Indonesia includes the islands. But, I must admit, it contains a disclaimer. [End map]

---

[47] See Reply of Indonesia, Vol. 12, Ann. 28.

55. [Tab 72: MI, Atlas, map 12 (detail)] I turn to the Malaysian maps which Ms Malintoppi sought to rely on. In particular she relied on some maps which show innominate lines east of Sebatik. Mostly they show what is apparently an internal provincial boundary of one or more of the districts of North Borneo. Some of these maps show the provincial boundary stopping in the open sea before going very far, for example, representing the administrative district of Tawao. Others show it continuing further east. All of them appear to show Ligitan north of the line, whatever line it may be. You can see on the screen one of those maps, published by the Directorate of National Mapping in 1966, called "Malaysia Timor. Sabah". It is tab 72. It contains a disclaimer. For some reason it does not show Sipadan at all. But, disclaimer or no disclaimer, the map does not attribute either of the two islands to Indonesia. In fact it treats Ligitan clearly as part of the Semporna district.

56. In this context I should say a brief word about Stanfords, the map publisher in London. They were, and still are, a commercial company. Just because they published maps for the BNBC did not make them official publishers. And anyway, the maps they published for the BNBC which show lines in the sea depict not international but internal administrative boundaries. At worst they are equivocal as to the islands outside those boundaries. [End map]

57. Counsel for Indonesia sought to give additional weight to its map case by two strategies. The first of these was to ignore any evidence contrary to their position, the second was to extend short lines into long lines.

58. As to the first strategy, Ms Malintoppi said that maps which showed no line to the east were to be ignored because they were boundary lines which stopped at the east coast[48]. Whereas those maps that did show lines extending some distance offshore were evidence of an allocation line proceeding to the east, and supported Indonesia's case. It was on this basis — and only on this basis — that she was able to say that the vast majority of maps supported Indonesia[49]. This is a splendid attempt to have it both ways: if we ignore all the evidence against a disputed proposition, it is not surprising that the evidence in its favour looks overwhelming. But this case is about a boundary line which is said somehow to turn into an allocation line beyond the territorial sea, and

---

[48] CR 2002/29, p. 47, paras. 53-54.

[49] CR 2002/29, p. 42, paras. 30-31.

the majority of maps that show the boundary stopping at the coast or proceeding only a few miles as it may be a territorial sea boundary, like the Tarakan map I just showed you, are evidence against there being any allocation line. Such maps, the majority, cannot simply be ignored.

59. [Tab 73: 1968 Kalimantan map] The second strategy was more pervasive. Indonesia treats every line on a map which extends east of Sebatik as supporting its case, irrespective of the length of the line or the character of the boundary shown. Let me take the issue of length. Those maps that do show lines east of Sebatik often show rather short lines, as I have said, and they are evidence of nothing as to the areas much further east. Indonesia has to take those lines, extend them to the east, and stop them after they reach Ligitan. In other words it has to reconstruct the lines in order to suit its claim. Take for example the 1968 Indonesian map of "Kalimantan Utara", which is tab 73 in your folders. You can see that there is a line extending a few miles to the east of Sebatik. Indonesia wants to treat the existence of that line as significant, but not its length. Again, it cannot have it both ways. The cartographer had a reason for drawing the line to the east, we assume — perhaps to depict a presumed territorial sea boundary — and a reason for stopping the line where it stopped — perhaps an awareness that the territorial sea does not go out very far. On this map the line is about 6 nautical miles from the coast. It is quite illegitimate to count such a map as supporting an allocation line reaching 50 miles further east. The map is the more significant in that it was produced just before the dispute arose. It does not support the Indonesian position. [End Kalimantan map]

60. [Show internal Dutch map] Actually there is a similar problem with the internal Dutch map itself. You will recall that Indonesia portrayed the line as a red line with an arrow. The line on the internal Dutch map does not have an arrow — another touch of "Harry Potter", perhaps! Indonesia portrayed the line as extending beyond Ligitan. The line on the internal Dutch map fell far short of Ligitan. Even that map, which is Indonesia's crucial piece of evidence, has to be subjected to plastic surgery in order to support its case.

61. [Tab 74: show extension of Indonesia's arrow as far as Karakelong Island] But then, one must ask, if the line is to be extended eastwards, why should it stop after it gets to Ligitan? Why should it not keep going? This is Indonesia's map from the Memorial, with the line drawn across the map. Why should it stop just after Ligitan? Ligitan was not mentioned before 1891.

You can see on the map what happens if the line keeps going: it cuts through an island called Karakelong Island, which is part of Sulawesi and is — or at least has been considered up to now to be — part of Indonesian territory. According to Sir Arthur Watts, Malaysia gets the advantages of the allocation line as well as the disadvantages. So why does Malaysia not get the northern part of Karakelong Island to go along with the northern part of Sebatik? Why must the line stop after Ligitan and not extend as far as the territories owned by the Parties? After all, it has an arrow on it and an arrow can travel quite a long way across a map. No doubt Indonesia will say — indeed Sir Arthur Watts actually said, he may have had Karakelong island in his mind — the line has to stop somewhere. In which case, why not stop it where it stops on the map[50]? And if you do that, virtually none of the 67 category C maps supports Indonesia's case. [End map]

CONCLUSION

62. Mr. President, Members of the Court, let me turn from the rather arid topic of inconsistent maps to the more interesting topic of inconsistent cases. Here, it is *Indonesia's* case which is inconsistent, and multiply inconsistent. Let me take six inconsistencies, having regard to the time of afternoon.

(1) Indonesia is inconsistent in being unable to decide whether Bulungan matters or not. Their Memorial says it does; their Reply says it doesn't. This week Sir Arthur said it didn't, and Professor Soons said it did. Perhaps they will make up their minds next week.

(2) Indonesia is inconsistent in claiming a treaty title deriving from Britain at a time when, it accepts that Britain did not own the islands.

(3) Indonesia is inconsistent in its treatment of *effectivités*. A half hour of the *Lynx* boarding party in Sipadan is considered as evidence of open and continuous administration "throughout the period". On the other hand, substantial evidence going back to 1903 of the regulation of turtle egg collection on Sipadan is treated as private and sporadic.

(4) Indonesia is inconsistent in its treatment of the critical date. It seeks to exclude evidence of Malaysia's regulation of tourism on the islands, but not their own evidence of an occasional incursion by a so-called Boy Scout troop.

---

[50] CR 2002/28, p. 16, para. 34 (Sir Arthur Watts).

(5) Indonesia is inconsistent in its treatment of navigational lights. The erection after the critical date of lights on reefs far to the west (Alert Patches and Roach Reef) is treated as significant. On the other hand, Malaysia's erection of lighthouses on the islands themselves before the critical date is treated as virtually irrelevant.

(6) Indonesia is inconsistent in its treatment of maps, whether these are produced by governments or private companies. The internal Dutch map does not show any islands south of the line and is not accompanied by any legal reasoning whatever. Yet it is treated as decisive. The United States Hydrographic Office map of 1903, which does show the islands surrounded by a line — it is unequivocal as to what it shows — is treated as irrelevant, even though it *was* accompanied by legal reasoning and even though Britain expressly accepted the legal reasoning. As to private maps, those which show lines in the sea are treated as decisive, however short the line; those which do not show lines in the sea are treated as irrelevant. And, it may be observed, this when the real question is whether a land boundary line somehow became something else. I could go on, but I won't.

63. Indeed it would be wrong to end on a negative note. Let me summarize, affirmatively, Malaysia's case. There are six propositions.

(1) The Ligitan Group was never part of the Sultanate of Bulungan. The islands were, and were acknowledged by both Britain and the Netherlands to be, Sulu Islands.

(2) The islands were not part of British North Borneo in 1891, and therefore no treaty title could arise from the 1891 Convention, and this, however Article IV of the Convention might be interpreted.

(3) Most important of all, the 1891 Convention cannot bear the meaning Indonesia seeks to give it. Read in the context of the negotiations, Article IV is quite clear in being limited to land boundaries and in relation to Sebatik to being limited to the island of Sebatik. The internal Dutch map is not part of the *travaux préparatoires* and is inadmissible in the interpretation of the Treaty. By contrast the 1915 Demarcation Agreement is a related agreement within the meaning of Article 32, paragraph (3) *(a)*, of the Vienna Convention on the Law of Treaties; the annexed demarcation map is both admissible and decisive as to the interpretation of Article IV, if the language of Article IV did not already achieve that result.

(4) Dutch conduct after the conclusion of the 1891 Convention is wholly inconsistent with Indonesia's position. At no stage did the Dutch claim the islands, whether by further agreements with the Sultan of Bulungan, by maps or by any other conduct. Nor did they ever protest the public acts of Britain or the United States which should have raised questions about control over the islands for any State which claimed them.

(5) The issue of the possession and eventual title to the islands was publicly resolved between Britain and the United States after 1903, without any suggestion that any third State was involved.

(6) Neither the Netherlands nor Indonesia exercised any effective control over the islands at any stage. By contrast Malaysia and its predecessors did. The evidence of *effectivités* overwhelmingly favours Malaysia. Since Indonesia cannot claim a treaty title, the relevant test is that of the *Island of Palmas* and *Eastern Greenland* cases: which State can show the better claim based on administration? The answer is, without doubt, Malaysia. But even if the Dutch had a treaty title in theory, their failure to assert it after 1891, combined with actual administration and control over the islands by the BNBC and Britain, must have put an end to that theoretical claim well before 1945.

64. Mr. President, Members of the Court, that concludes Malaysia's first round presentation. On behalf of the Malaysian team may I thank the Court for its patient attention. Thank you, Mr. President.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. C'est par cet exposé que prend fin l'audience de ce jour. Je tiens à remercier chacune des Parties pour la qualité des exposés qui nous ont été présentés. La Cour se réunira à nouveau à partir du lundi 10 juin, à 10 heures, pour entendre le second tour de plaidoiries de la République d'Indonésie qui disposera à cet effet de deux séances, l'une de trois heures, lundi matin, et l'autre de une heure et demi maximum, lundi après-midi. Le second tour de plaidoiries de la Malaisie est prévu dans les mêmes conditions pour le mercredi 12 juin. Je rappellerai toutefois que, conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les présentations orales doivent être aussi succinctes que possible. J'ajouterai que le second tour de plaidoiries a pour seul objet de permettre à chacune des Parties de

répondre aux arguments avancés oralement par l'autre Partie. Le second tour ne doit donc pas constituer une répétition des présentations déjà faites par les Parties qui, au demeurant, ne sont pas tenues d'utiliser l'intégralité du temps qui leur est alloué. Je vous remercie. La séance est levée.

L'audience est levée à 16 h 35.

CR 2002/33

International Court of Justice
THE HAGUE

Cour internationale de Justice
LA HAYE

YEAR 2002

Public sitting

held on Monday 10 June 2002, at 10 a.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le lundi 10 juin 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. Nous sommes réunis aujourd'hui pour entendre le second tour de plaidoiries de la République d'Indonésie.

M. Oda, pour des raisons dont il a dûment fait part à la Cour, ne peut être présent sur le siège.

Je donne immédiatement la parole, au nom de la République d'Indonésie, à Sir Arthur Watts.

Sir Arthur WATTS: Thank you Mr. President.

1. Mr. President and Members of the Court. In beginning this second round in the presentation of Indonesia's arguments, I will respond to Malaysia's arguments on two main issues. First, the geography of the area in which Sipadan and Ligitan are located, and second, the 1891 Convention.

Sipadan and Ligitan: Geographic considerations

2. Sipadan, the Court will recall[1] is heavily wooded; Ligitan[2], in contrast, is mainly sand — with just a few low shrubs and trees. Neither island sustained a permanent resident population.

3. Malaysia attributes considerable weight to the closeness of the two islands to the Malaysian mainland coast, and their relative distance from the Indonesian mainland coast of East Kalimantan.

4. There is, however, nothing in international law which stipulates that an island (at least one which is outside the territorial sea) which is closer to one State's mainland than to another's therefore, and solely by reason of that greater proximity, belongs to that first State.

5. Proximity and sovereignty are completely separate matters. There is no doubt, for example, that by virtue of the Anglo-United States Treaty of 1930 the Turtle Islands belonged to the United States despite being over 150 nautical miles from Jolo (the nearest large Philippine island) but only some 10 nautical miles from the Borneo mainland; the British Channel Islands are under British sovereignty even though they are only 8 nautical miles from France but 60 from the United Kingdom; there is no doubt also that numerous islands in the Aegean Sea within sight of

---

[1] Indonesia's first round, judges' folders, tab 3.

[2] *Ibid.*, tab 4.

Turkey's Anatolian coast belong to Greece. There are many other similar examples, but those three will suffice to make the point.

6. As to the geographical facts, the Parties are in broad agreement. Sipadan is some 15 nautical miles from the Malaysian mainland coast, and just over 40 nautical miles from the Indonesian east coast of the island of Sebatik. For Ligitan those distances are respectively in the region of 21 nautical miles and 57 nautical miles.

7. Compared with the distances involved in the other examples which I have just quoted, they are neither so close to Malaysia, nor so distant from Indonesia, as to invite comment.

8. On the screen now, and at tab 1 in the judges' folders, is a modern nautical chart of the area: it was published by the United States Defense Mapping Agency, and corrected to 16 November 1985. Sipadan and Ligitan are identified, now in larger format. Sipadan is clearly quite separate. The mass of moderate-depth soundings close to the coast contrasts sharply with the isolation of Sipadan in much deeper water. If we go in even closer, we can see how sharply Sipadan rises from the sea floor — from depths of several hundred fathoms just a few hundred metres offshore. In fact, Sipadan is of volcanic origin. It is the top of a steep sea-mountain some 600-700 m above the basic sea floor.

9. Moreover, Sipadan is clearly well to the south of the famous 4° 10' N line. Both Malaysia[3] and Indonesia[4] agree that its latitude is 4° 6' 39" N.

10. Ligitan is very differently formed. It is an island part of a more extensive, largely submerged, coral reef. It is distinct from mainland Malaysia, being separated from it by waters running as deep as some 40 m, forming a clear navigational channel. I should here just explain that the representation of the reef on the chart as a dark shaded area does *not* mean that that whole area is, even at low tide, above water: it is not, and indeed for the most part it is at all times submerged to a greater or lesser depth — the shading on the chart is in effect simply a clear indication to mariners to keep well away.

11. A word of explanation about the nomenclature adopted on the chart — and on other maps and charts of the area — which may help.

---

[3] CR 2002/30, p. 24, para. 15.

[4] Memorial of Indonesia, para. 2.8.

12. One matter may be quickly disposed of. The Parties agree that the feature marked on many maps as "Ligitan Reefs", well to the west of the island of Ligitan and of the so-called Ligitan Group, is quite separate from Ligitan Island, and is not the subject of the present dispute[5].

13. Second — and again the Parties agree — Ligitan itself is an island — that is, an area of land surrounded by water, and permanently above water at high tide. The Parties have given its co-ordinates — Malaysia puts it at 4° 09' 48" N[6]. Both Parties agree that the island lies to the south of the 4° 10' N parallel of latitude.

14. Third, that island of Ligitan is near the southern tip of an approximately star-shaped coral reef. Most of this reef is permanently under water, but at low tide parts of it are exposed up to 1.2 m. Most of this reef structure lies to the north of the Convention line at 4° 10' N.

15. The situation can readily be illustrated. On the screen now is the chart showing the features with which the Court is familiar. It shows the maritime features visible at low tide — the familiar star-shaped reef, the islands of Si Amil and Danawan at the northern end of the reef and Ligitan near the southern end, and other relevant islands (Mabul, Kapalai, Sipadan and Omadal) in the surrounding waters.

16. But now let us depict the rising waters at high tide, the sea level which is legally relevant for islands. The result is on the screen now, and at tab 2 in the judges' folders. The reef has disappeared. Si Amil, Danawan and Ligitan are now seen in their true light — separate islands, with Si Amil and Danawan close together in the north, and Ligitan out on its own in the south, isolated, and separated by some 9 nautical miles from the other two. Malaysia's attempt to link Ligitan with the others as if they constituted a single geographical unity, is now seen to be utterly misplaced.

17. That brings me to my fourth point — the practice whereby the islands in this reef area may be referred to on charts and maps as "the Ligitan Group". They are clearly important as a navigational hazard for vessels sailing around the Semporna Peninsula, and there is really no other way of signalling that than by regarding them as a group. It would obviously be unwise to the

---

[5] For Malaysia's view in this sense, see CR 2002/30, p. 23, para. 10.

[6] CR 2002/30, p. 24, para. 13. Indonesia places Ligitan at 4° 9' 35": Indonesia Memorial, p. 6, para. 2.8.

point of foolhardiness for mariners, even at high water, to attempt to sail across the waters above the reef.

Mr. President: as I wrote that last sentence I found that I had referred to sailing "across" the reef — I am sure that nobody would have understood me to be suggesting that vessels going "across" those waters would stop as soon as they reached the other side of the reef: but that is what Malaysia would have the Court believe is meant by the use of that same word in Article IV of the 1891 Convention.

18. To return, however, to the nautical charts, the practice of lumping those islands together is purely a matter of hydrographic convenience: it has no implications or consequences for territorial sovereignty.

19. For one thing, navigational charts designating island groups are typically imprecise as to the individual components of that group. Clarity of that kind is not a necessary part of a navigational chart. The words "Ligitan Group" on the chart on the screen tell you nothing about precisely which islands form part of the group.

20. Moreover, even Malaysia is unclear as to the composition of this group of islands. For Malaysia's Co-Agent, "Ligitan and Sipadan form part of a group of small islands comprising Mabul, Omadal, Kapalai, Danawan, Si Amil, Ligitan and Sipadan"[7]. A quarter of an hour later, Sir Elihu Lauterpacht evidently thought that that was excessive so he dropped Mabul[8]. Not to be outdone, Professor Crawford, the next day, dropped Mabul *and* Omadal[9]. Malaysia's Reply went one better, or worse: it not only dropped Mabul and Omadal, but Kapalai as well (para. 2.14). So the Group is down to only four islands, not the seven Malaysia's Co-Agent started off with. That is a singularly uncertain basis on which to construct an alleged "unity" between the islands of this so-called Group.

21. Next, and contrary to what Professor Crawford said[10], the second edition of the British Sailing Directory for the area did *not* treat Sipadan as part of the Ligitan Group. While the first

---

[7] CR 2002/30, p. 25, para. 20.

[8] CR 2002/30, p. 28, para. 9.

[9] CR 2002/30, p. 41, para. 1.

[10] CR 2002/30, p. 51, para. 17.

edition did include Sipadan among the "Ligitan Islands", by the time of the second edition of 1903 — after the area had been more fully surveyed by the *Egeria* — Sipadan was no longer treated as part of the Ligitan Group but was listed separately.

22. Malaysia's Co-Agent's inclusion of Mabul and Omadal in the Group demonstrated the implausibility of the "unity" idea — for Mabul and Omadal, being within 9 miles from the coast, were included within the 1878 grant by the Sultan of Sulu to Dent and Von Overbeck, and thereby became part of British North Borneo, while all the other islands in this so-called "united" group did not. So much for the unity of this Group!

23. Malaysia's contention that Sipadan and Ligitan are part of this "Ligitan Group", and that they are somehow a social, geographic and economic unity, is demonstrably wrong.

— Let me take first Sipadan. It is far-fetched to consider it part of this Group at all: it simply is not. It clearly is not a geographic unity with any of the other islands. The map on the screen makes this clear. Sipadan is an entirely distinct and isolated marine feature, volcanic in origin, and separate from Ligitan, the other neighbouring islands, and the Malaysian mainland. I also draw the Court's attention to map 20 in Malaysia's Atlas. That map marks the Ligitan Group, but places the international boundary between it and Sipadan: and that map is an official Malaysian map, clearly separating Sipadan from the rest of the so-called Group.

— Turning to Ligitan, Malaysia suggests that Ligitan was socially and economically a unit with Danawan and Si Amil, since fishermen from those two islands visited Ligitan in the course of their fishing activities. But such visits do not make separate territories a "unity", with implications for territorial sovereignty. These visits — about which the Court has been supplied with no detailed statistical evidence as to their social or economic significance — were at best no more than occasional, seasonal visits by private persons engaged in their private pursuits. As the Tribunal said in its recent Award in the First Phase of the *Eritrea/Yemen* arbitration[11], "substantial evidence of individual fishing practices . . . is not indicative as such of state activity supporting a claim for administration and control of the Islands".

---

[11] *Eritrea/Yemen Arbitration (First Phase)*, 9 October 1998, at para. 315.

Even more is this so when, as with Ligitan, the evidence is far from "substantial", and the fishing activities, such as they were, were only sporadic and seasonal.

24. Mr. President, this Malaysian "unity" argument is simply fanciful: it cannot be sustained.

1891 Convention: object and purpose

25. Let me turn, Mr. President, to the 1891 Convention. Malaysia suggests that the underlying purpose of the 1891 Convention was to settle the problem of the island of Sebatik[12], rather than, as Indonesia has shown, to reach a permanent settlement of all actual and future territorial problems in the area.

26. There is, perhaps, not a great deal between the two Parties on this issue. Indonesia has shown that both Parties clearly wanted to avoid actual and future disputes. The geographical uncertainty over the vast inland areas of Borneo, the territorial uncertainty between the Sultans of Boeloengan and Sulu, the repeated problems over, for example, flag-flying at Batoe Tinagat, the activities of Dutch naval vessels at the island of Mabul — all these sorts of things contained the seeds of serious trouble.

27. It was to put a stop, once and for all, to such problems that the Parties wanted to reach a settlement. But such a settlement affected the whole Tidoeng-Semporna region of their mutual rivalry. It was then clear that in that region there was a major problem over Sebatik, which had to be settled as part of the same package. So far as concerns this present case, Article IV of the Convention encapsulates, within its single sentence, *both* aspects of what the Parties wanted to achieve.

1891 Convention: *travaux préparatoires*

28. Turning to the *travaux préparatoires*, Malaysia has said that unilateral statements by one of the Parties in the course of negotiation are not part of the *travaux préparatoires*[13]. But this must be wrong, for the *travaux* will most often consist of such unilateral statements by each negotiating

---

[12] CR 2002/31, p. 17, para. 21 (Mr. Cot).

[13] CR 2002/31, p. 24, para. 56 (Mr. Cot).

party; and they *are* relevant, for they throw light on what the Parties had in mind in concluding the treaty.

29. But more than that, there is the question whether recourse to the *travaux préparatoires* is admissible at all. Such recourse is permissible when the application of the normal rules of treaty interpretation leaves the meaning ambiguous or obscure. If the parties have clearly set out in the treaty the outcome of their negotiations, one must not subsequently unravel their agreement by recourse to the *travaux*: they agreed whatever it was that they agreed, for their own good reasons, which may or not have been evident in the record of their meetings.

30. In Indonesia's view, Article IV is, by the application of the normal rules of treaty interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties, perfectly clear. Whatever the reasons might have been, the parties did a deal. All we know is that they agreed Article IV which (especially in contrast to Article III, and in line with the Convention's object and purpose) expressly required the line to "be continued eastward along" the 4° 10' N parallel of latitude — that is exactly what it said, and what the parties must be taken to have meant in agreeing to it.

31. Professor Cot then had a lot of fun with what he tried to laugh off as Professor Alain Potter's cartographic magic show: it was all an illusion, Professor Cot said[14]. So entranced was he by the magic, however, that he missed the real show which was on stage. He was at pains to try to show that a particular British proposal — the one, the Court will recall, with the line going south-east between Sebatik and Nanoekan and then due east along the 4° parallel to point D — had never been put to the Dutch.

32. But that missed [illegible] point completely. Indonesia was not trying to establish that the Dutch had in the negotiations seen and agreed to such a line, as put forward by the British. The point was rather that, contrary to the position taken by Malaysia, the British themselves were not thinking solely of a line on land, but had in mind also a line going out eastwards to sea. For that purpose, British proposals — and whether or not conveyed to the Dutch — are directly relevant: they show beyond question that some significant degree of maritime extent for the line eventually

---

[14] CR 2002/31, p. 27, para. 66.

to be agreed was in the minds of the British. And that matches what we also clearly know of the Dutch view, since we have, in the Explanatory Memorandum map, their understanding of the outcome. And it is probably no coincidence that the point D line which the British had in mind extended eastwards to almost exactly the same distance as did the eastward line on the Dutch Explanatory Memorandum map — in both cases the line goes about 10 nautical miles beyond Sipadan.

33. We know — for the record clearly shows — that both sides were contemplating different ideas and lines as ways of settling the issues before them. We know too that the two sides were exchanging proposals, sometimes formally at meetings, sometimes less formally during other meetings or in correspondence. We know that the British did put to the Dutch a proposal for a line going between Sebatik and Nanoekan. We know that the British themselves contemplated the more complete line going out to point D, and that that line was framed in British internal papers as a proposal to be used in the negotiations. And nor does "point D" proposal stand alone. It is — as Professor Pellet showed[15] — part of a pattern of similar maps, just as one would expect in a negotiation.

34. *All* these things are clear from the record. And Indonesia relies on them to show one thing — namely, that during the negotiations both parties, and in particular the British themselves, had in mind a line extending out to sea and not just limited to the mainland of Borneo. That single fact is amply demonstrated by the record — and it is totally inconsistent with Malaysia's arguments that the parties were only thinking of a land-based settlement.

1891 Convention

35. As for the 1891 Convention itself, Malaysia briefly discussed the meaning of the word "across". In its Memorial and Counter-Memorial[16] Indonesia set out its, different, view as to the meaning of that word, as involving movement over and beyond the object being crossed. And as I showed a few minutes ago, that is the perfectly natural meaning of the word as I happened to use it in relation to sailing across the waters above a reef.

---

[15] CR 2002/27, pp. 53-55, paras. 51-59.

[16] Counter-Memorial of Indonesia, para. 5.43 *(h)*; Counter-Memorial of Indonesia, paras. 5.22-5.23.

36. What was most significant about Professor Cot's discussion of the word "across" was that he took it on its own, without reference to its context. That word accompanies the phrase requiring the agreed Convention line to be "continued eastward along". That phrase, in the main clause of the sentence, gives the context within which the word "across" is to be understood. "Across" is in *no way* inconsistent with the natural meaning of the treaty requirement that the line "be continued eastward along" the agreed parallel: indeed it confirms it.

37. On 6 June Sir Elihu Lauterpacht posed a number of questions, to which he said that there was no answer which supported Indonesia's case[17]. On the contrary, there *are* answers to his questions — simple and straightforward answers — and *all* of them *do* support Indonesia's case. Let me deal briefly with his first eight questions, which are those which relate directly to the 1891 Convention.

38. His first question noted that the Convention related to the boundary "in" the island of Borneo, and he asked therefore why it should extend out to sea well to the east of the land areas claimed by the Netherlands. The answer is threefold: first, it is quite usual for major land areas to be referred to as including their associated islands, as Indonesia explained in its Counter-Memorial[18]; second, the line needed to extend out to sea because there were potential disputes there as well as on land — witness the visit of the *Admiraal van Kinsbergen* to the island of Mabul —, at the time a sufficiently recent reminder of a potential source of trouble; third, the Dutch claim line on land was irrelevant to its claims at sea and certainly did not mean that there were no such claims — any more than the equal absence of British claim lines at sea meant that the British had no claims to islands. *Both* States had maritime interests and insular pretensions, and they had to be settled if the aim of a comprehensive avoidance of future disputes was to be achieved.

39. Second, Sir Elihu asked how the boundary came to extend more than 50 miles out to sea, and pointed to the word "across" as not itself having that effect. Answer: "across" is perfectly consistent with that consequence, particularly when read with the immediately preceding words "continued eastward along". *That* is the treaty basis for extending the line seawards — indeed, it is

---

[17] CR 2002/30, pp. 30-37, paras. 15-25.

[8] Counter-Memorial of Indonesia, para. 5.14 *(e)*.

the treaty *requirement* for doing so. It *might* have been expressed differently: so might almost any treaty provision. But it wasn't, and the way it was expressed in Article IV was entirely sufficient to achieve the intended purpose of continuing along the agreed parallel.

40. Third, he asked why there should be any mention of a line running "across Sebatik" if not to indicate that those words indicated a limitation on the extent of the line, and not a continuation of it. Answer: the need for a reference to the line crossing Sebatik was to make it clear that the other options considered in the negotiations — of giving Sebatik wholly to one side or the other — were rejected[19]. Just as the emphasis on the attribution of the northern part of the island to the British North Borneo Company "unreservedly" similarly made it clear — as Malaysia has itself said[20] — that the options of some kind of lease-back arrangement or servitude involving rights of transport were also being rejected.

41. Fourth, he asked a composite series of questions about the Explanatory Memorandum map: *(a)* why should it be allowed to vary the text of the Convention? *(b)* can one party put its own interpretation on a treaty? *(c)* how many people in Great Britain would have focused on the map? Answers:

— As to *(a)*: the map did not "vary" the text, it illustrated the Dutch Government's view of what it meant — a view entirely consistent with the terms of Article IV, "continued eastward along".

— As to *(b)*: one party can indeed put its own interpretation on a treaty — that is what in fact usually happens. That view does not, of course, taken on its own, commit the other party; a unilateral interpretation only commits the other party if it had in some way agreed to it or acquiesced in it — which is precisely what happened here, as I will show in a moment.

— As to *(c)*: I will answer this more fully in a moment as well, but for now I will just say that we know that Britain's diplomatic representative in The Hague, for one, focused on the map — he drew particular attention to it.

42. Fifth, Sir Elihu asked why, if the line was intended to be an allocation line, there was no later consistency in the maps. Answer: but there was a large measure of consistency in later maps, many showing — but only after 1891 — a line following the 1891 Convention line out to sea.

---

[19] See CR 2002/28, p. 17, para. 37 (Sir Arthur Watts).

[20] CR 2002/31, p. 28, para. 69 (Mr. Cot).

What other basis could there have been after 1891 for depicting such a line? That is a question which Malaysia has not answered, even in relation to such lines appearing on Malaysia's own official maps. As Ms Malintoppi will explain, *any* line out at sea along the 4° 10' N parallel undermines Malaysia's case; repeated lines fatally undermine it; and repeated lines on Malaysia's own maps take Malaysia's case beyond all hope of resurrection.

43. Sixth, Sir Elihu noted the apparent confusion between a "boundary" line and an "allocation" line. Answer: read Indonesia's Counter-Memorial[21]. There Indonesia showed that a line is often termed a "boundary" line even though it is in fact what may be called a line of attribution.

44. Here I might interpolate a word about Professor Cot's disquisition on lines of attribution[22] — four words in fact: "elegant", "erudite", "academic", — and "unpersuasive". Much of what he said was in accord with Indonesia's view of the matter. Thus, of the two characteristic traits to which he drew attention, the first — that lines of attribution are not lines of maritime delimitation — causes Indonesia no problems. Such lines are indeed mere cartographic devices.

45. But it is wrong to go on to argue that because a treaty uses the term "boundary" it is necessarily prescribing a line which separates adjacent sovereign territories, and therefore cannot be establishing a line of attribution. "Boundary" is used in treaties which expressly allocate islands by way of lines of attribution at sea: the Anglo-United States Treaty of 1930 is but the simplest of examples[23].

46. What matters is the substantive effect of the line, not its name: substance is determinative, not form. If a line in fact separates adjacent areas subject to a sovereignty of different States, it is indeed not a line of attribution but what one might call a frontier *stricto sensu*: but if a line — even perhaps a different part of the same line — delineates areas which are not themselves subject to State sovereignty but which contain territories whose allocation is determined by their relationship to the line, then the line *is* an allocation line.

---

[21] Counter-Memorial of Indonesia, para. 5.12.

[22] CR 2002/31, pp. 19-24, paras. 28-54.

[23] See Counter-Memorial of Indonesia, para. 5.12.

47. Moreover, it is a caricature to suggest, as did Professor Cot[24], that Great Britain and the Netherlands were, in 1891, agreeing to a line of attribution only in the abstract, and in ignorance of whether there *were* any islands to share. They knew, as the record, and contemporary cartography, make abundantly clear, that there were many islands out to sea, eastwards of Sebatik. That is precisely why it was necessary to deal with them one way or the other — as they did, in Article IV.

48. Professor Cot's second "characteristic trait" was that treaties establishing attribution lines expressly state that islands on either side of the line belong to the designated State. There are three responses to this. First, to show that that is what States often, even usually, do does not establish that as a matter of law they cannot achieve their purpose in some other way. Second, it is clear from Professor Cot's examples that there are various ways, as a matter of treaty language, of achieving the desired result. Third, the 1891 Convention exemplifies such a variation: it establishes a boundary — not a term with exclusively territorial connotations — between the Netherlands and British possessions — again not a term with exclusively territorial connotations — by adopting a line which, in relevant part, is required to "be continued eastward along" an agreed parallel of latitude — eastwards, of course, being known to the parties as being out to the open sea. The parties might have chosen to achieve their desired result in many different ways: but they chose the way they did, and that way was entirely adequate to achieve their purpose.

49. To return now to Sir Elihu's questions, in his seventh he noted that, as regards the distinction between Articles III and IV, there was an identifiable place on the west coast — Tandjong Datoe — "to" which Article III could say that the line ran, while there was no such named town on the east coast of Sebatik. Answer: you do not need a town: it would have been very easy to say "follow the 4° 10' N parallel until it meets the east coast of the island" — which, in fact, is exactly what the parties did in Article I in identifying the starting point for the line: "shall start from 4° 10' N latitude on the east coast of Borneo". But they carefully did not say that in Article IV, because that was, in that context, *not* what they intended.

50. Sir Elihu's eighth question — and the last which I shall dispose of — was why the 1913 Joint Commission Report, incorporated into the 1915 Agreement, made no mention of any

---

[24] CR 2002/31, p. 21, para. 39.

extension of the boundary eastwards of the pillar on the east coast of Sebatik. I shall deal with the 1915 and 1928 Agreements more fully in a moment, but the immediate answer is that the 1913 Commission dealt only with *part* of the boundary, and was essentially a demarcation exercise. You cannot demarcate at sea in anything but the shallowest of waters; there is no need to demarcate at sea where a line is delimited as simply following a parallel of latitude — that is all you need in order to fix the actual course of the line on the surface; and in any case, one does not demarcate a line of attribution.

51. Let me turn now to another of Malaysia's arguments — that Great Britain could not, by the 1891 Convention, have given Sipadan and Ligitan to the Netherlands because they were not Britain's to give. The argument is both unrealistic and misconceived.

52. It ignores the extent to which the situation at that time was wholly uncertain. It was that very uncertainty which had prompted the conclusion of the 1891 Convention in the first place. Boeloengan's and Sulu's domains were a matter for sharp differences; in any event Sulu was now out of the picture; and Spain was not in the least interested in what was going on south and west of the Sulu Archipelago. The record in this case shows a number of instances of the BNBC, *admittedly without having any title*, taking action in relation to various of the offshore islands[25]. The British proposal for a line out to sea south of Sebatik and following the 4° N parallel of latitude showed scant regard for who (other than the Netherlands) might be interested in the affected waters. In fact, both parties assumed that they were in practice the only relevant actors in the area, and that British proposal clearly showed that Great Britain had an interest in the waters — and their islands — east of Sebatik.

53. The Malaysian argument is misconceived because, as Indonesia has already pointed out in its written pleadings[26], the 1891 Convention was not a treaty of cession. Neither party was "giving" its territory to the other, and this was as true of the Netherlands for possessions north of the Convention line as it was for Great Britain's for possessions south of it.

---

[25] Thus "The Sulu grant of 1878 did not extend to islands (such as Sipadan and Ligitan) which were more than nine nautical miles offshore, but in fact these islands were administered by the BNBC": Counter-Memorial of Malaysia, p. 52, para. 3.1.

[26] Reply of Indonesia, para. 1.13.

54. The circumstances leading up to the Convention precluded any interpretation of its provisions as involving cessions. The Convention was as it was precisely because the parties could not agree on the extent of their respective territories. It would therefore have been impossible for them to have reached an agreement whereby either of them could have accepted a transfer of territory to itself from the other party, for that would have been to recognize that that other party itself had title to the territory in question, and *that* was the very thing they could not agree upon.

55. Nothing in the circumstances leading up to the Convention suggests that either of the parties would have contemplated receiving ceded possessions from the other; nothing in the Convention itself suggests that cession of territory was in the parties' minds; nothing in the language of the Convention reflects the usual language of cessions of territory; and nothing after the Convention represented the normal tradition of the possessions ceded from the one sovereign to the other.

56. Rather, the Convention simply prescribed a line forming the boundary between the parties' respective possessions — that is exactly how the starting point for the boundary is described in Article I. As between the two contracting States, the Netherlands was agreeing that it had no possessions north of the agreed line and that for its part it recognized that possessions to the north were British; similarly, Great Britain was agreeing that it had no possessions to the south of the line, and that for its part it accepted that those southern possessions were Dutch.

57. Whether any of those possessions belonged to any other State was an entirely different matter. It is in fact clear that, as I have said, both parties were satisfied that they were at the time the only two competing States in the region: Sulu had left the scene, and Spain had no interest in the islands to the south and east of the Sulu Archipelago. *If* any third party chose to come forward at a later date, it would, of course, have regarded the Anglo-Dutch Convention of 1891 as *res inter alios acta*, and the matter would have had to have been resolved on its merits. But that was for later (if at all), and would be a matter to be dealt with either between the British and that third party, or between the Dutch and that third party: but, *as between the Dutch and the British*, the matter was settled — neither had any claim to possessions on the other's side of the agreed line.

58. In fact, that is the key to the whole situation. Malaysia hypothesizes some third party title holder. But who? As Mr. Bundy showed last week[27], it could not have been Sulu, because the Sultan of Sulu had by then given up its interests to the British North Borneo Company or to Spain; not Spain, which by then had no interest in the islands in that area; not the United States, which had not yet come on the scene. Yet they were not *terrae nullius*, for Malaysia is most insistent on that[28]. That Malaysia's argument leads to such an impasse demonstrates that the argument itself is flawed.

59. What we have in the 1891 Convention is an agreement by which, *inter alia*, Great Britain agreed with the Netherlands that Great Britain had no possessions south of the line. Then by the 1930 Anglo-United States Treaty we have the culmination of Malaysia's alternative line of argument whereby title, having passed eventually to the United States — so they say — was then passed on to Great Britain: be that as it may — and Indonesia does not accept it — it is nevertheless clear that *as between the United States and Great Britain*, the United States accepted that it had no claims to the islands and left them to Britain — but that acknowledgment can avail Malaysia nothing, for it would immediately bring into play the 1891 Anglo-Dutch agreement that Great Britain had no possessions south of the agreed line.

60. In short, in this case between the successors in title to the Netherlands and Great Britain, Malaysia, as successor to Great Britain, cannot, *as against the Netherlands [or now Indonesia]* rely on the 1930 Anglo-United States Treaty to provide a title which can prevail over the 1891 Anglo-Dutch Convention: that 1930 Convention was, for the Netherlands, and now Indonesia, *res inter alios acta*.

1891 Convention: Explanatory Memorandum map

61. Let me turn to Malaysia's treatment of the Explanatory Memorandum map. Malaysia has sought to challenge the evidentiary value of that map in two ways — first, by denigrating it as solely a "unilateral" or "internal" Dutch map; and second, by seeking to show that the British Government never acquiesced in it.

---

[27] CR 2002/28, p. 42, paras. 1 ff.

[28] Memorial of Malaysia, para. 3.1. Indonesia agrees: Counter-Memorial of Indonesia, para. 2.14.

62. Indonesia accepts that the Explanatory Memorandum map was, initially, a *Dutch* map rather than an *agreed* map, and that it was prepared by the Dutch Government for the domestic purpose of securing the ratification of the 1891 Convention. But those two considerations do *not* deprive the map of its singular importance in this case.

63. The map is a clear indication of the Dutch Government's understanding of the effect of Article IV of the Convention.

64. The map was contemporaneous with the Convention: it was placed before the Dutch States-General just one month after the Convention's signature.

65. The map was an official publication of the Dutch Government.

66. The map was no secret map, prepared only for internal purposes of the Dutch administration: it was publicly available.

67. The map showed what the Dutch Government understood Article IV to mean.

68. The map's purpose was to assist in securing the ratification of the 1891 Convention, the approval of the States-General being an express requirement of Article VIII of the Convention.

69. This was a map of obviously international significance, even if its preparation by the Dutch Government was inevitably, initially, a unilateral act of that Government. But that does not deprive it of its international value.

70. Things might have been different had the map been contested by the British Government, but that is the whole point — the British Government did *not* dissent from the map. It acquiesced in the map, and in particular in its depiction of the agreed line as one extending out to sea beyond the coast of Sebatik.

71. Malaysia has argued that the map was not officially communicated to the British Government by the Dutch Government, and that therefore knowledge of the map cannot be officially attributed to the British Government. Mr. President, this takes pedantry and formalism to the level of the absurd.

72. First, the Court has already determined the standard in this sort of situation. Last week[29] Indonesia drew attention to the so-called *Livre Jaune* map which featured in the *Frontier Dispute (Libyan Arab Jamahiriya/Chad)* case[30]. As explained then,

— there the Court was faced with a French map which differed from the text of the Anglo-French Declaration which it illustrated: here we have a map which is consistent with the treaty text in question;

— there, as here, the map was prepared by one party to the treaty in question;

— there, as here, it was both a contemporary and an official map;

— there, as here, the map was published and submitted to Parliament as part of the ratification process;

— there, as here, the map was public knowledge;

— but there, unlike here, the Court gave no indication that the map was actually known to the British Government: the Court seems to have regarded it as sufficient that the map was public knowledge, and that the British Government must be taken to have shared in that knowledge.

73. In that case the Court concluded that the French map constituted an authentic interpretation of the Anglo-French Declaration then in question. For the reasons just given the circumstances surrounding the Explanatory Memorandum map present an *a fortiori* case.

74. In the present case, the British Government's actual knowledge of the Explanatory Memorandum map can be demonstrated beyond any doubt — and quite apart from any knowledge it may be presumed to have had simply because of the general public awareness of the map.

75. Thus, first, the British Legation in The Hague followed the ratification debates in the Dutch Parliament very carefully. Those debates were regularly reported back to the Foreign Office.

76. Second, we know that the Minister — Sir Horace Rumbold — specifically knew of the map. He sent two copies of it back to London with his despatch of 26 January 1892[31], with which he also sent back the Explanatory Memorandum. And he singled out the map for special

---

[29] CR 2002/28, p. 23, para. 67.

[30] *I.C.J. Reports 1994*, p. 6.

[31] Reply of Indonesia, Vol. 2, Ann. 3.

mention — it was, he said, the only "interesting thing" in the papers he was sending back. He clearly knew what it was, and what it depicted.

77. Pausing there for a moment, it is amply sufficient to show that knowledge is attributed to a State through the knowledge of the head of its diplomatic mission in a foreign State, certainly where that knowledge was acquired in the course of his official functions and related to a matter of direct concern to the relations between the two States. Diplomatic missions are the official representative arms of their States in foreign States. What they do, what they know, is done by, and is known to, the States they represent.

78. But in our present case, the British Legation's knowledge goes further than that. As Professor Pellet showed last week[32], and as Indonesia has set out in its written pleadings[33], Sir Horace Rumbold was an active participant and channel for communication in the negotiations leading up to the 1891 Convention. He knew what was going on. And when he saw a Dutch map which depicted a line which Malaysia would have the Court believe was not what Article IV prescribed, he simply — so Malaysia suggests — sent it back to London with the comment that the map was "interesting".

79. That simply is not credible. Had the line not been correct, he would, in sending the map back to the Foreign Office, have made *some* comment to that effect. But no, he just said the map was "interesting". He will have known that, as Indonesia has maintained throughout these proceedings, it depicted the agreed line perfectly correctly, as following the Convention line out to sea along the 4° 10' N parallel of latitude.

80. Quite apart from Sir Horace Rumbold's conduct, it is clear that the map was known not just to the British diplomatic mission in The Hague, but also to the Foreign Office in London. Indonesia has submitted the signed Foreign Office slip acknowledging that the maps were received[34]. The Foreign Office kept the map in its archives, along with the Convention itself. And in due course those Foreign Office archives were transferred to the Public Record Office, the official depository for State archives.

---

[32] CR 2002/27, p. 52.

[33] Memorial of Indonesia, paras. 5.7 and 5.2.

[34] Reply of Indonesia, Ann. 3.

81. Clearly, therefore,

— as a result of public knowledge of the Explanatory Memorandum map, and

— as a result of the knowledge of it on the part of the British Legation in The Hague and of the head of that diplomatic mission in particular, Sir Horace Rumbold, and

— as a result of the Foreign Office's knowledge of the map, and its placement in the United Kingdom's official archives,

there can be no doubt that direct and contemporaneous knowledge of the map is attributable to the British Government.

82. Faced with that knowledge, the British Government did nothing. There is no record of any dissent from the map, whether in the Foreign Office, or in the Legation in The Hague.

83. The conclusion is irresistible. The map was correct. The British Government knew it was correct. It saw no need to protest, because it accepted the correctness of the map. It thereby acknowledged that Article IV of the 1891 Convention prescribed a line extending out to sea beyond Sebatik, and that as a result offshore islands to the north of that line were British, and those to the south were Dutch. That was what the deal had been; and that was what the Convention provided — and what the Explanatory Memorandum map correctly depicted.

1915 and 1928 Agreements

84. Malaysia has contrasted the Explanatory Memorandum map unfavourably with the map annexed to the later, 1915, Anglo-Dutch Agreement. Since that later map was agreed by both parties, and depicted a boundary which stopped at the eastern coast of the island of Sebatik, Malaysia argues that it shows that the 1891 Convention line also stopped at that coast.

85. But that argument involves an astounding *non sequitur*.

86. As Indonesia explained last week, the two later Anglo-Dutch Agreements which determined with greater precision parts of the 1891 line were only concerned with limited sectors of that line. The sketch-map which was shown last week is on the screen again now: it is at tab 3 in the folders. It illustrates the very limited areas covered by the 1915 and 1928 Agreements — only about 20 per cent of the total.

87. While that 20 per cent of the Convention line may indeed have been superseded or improved by the terms — and maps — of the two later conventions, in no way can it be argued that the remaining 80 per cent of the Convention line was wiped away. That remaining 80 per cent remains as it originally was, that is, as specified in the Convention. That remaining 80 per cent of the Convention line, whether to the east or the west of that limited stretch, was simply not touched or affected by those Agreements.

88. While the stretch of boundary covered by the 1915 Agreement may have started (or ended, depending which way you are going), at the east coast of Sebatik, there is *nothing* in the text to suggest that the *Convention line* started (or ended) there.

89. The two Governments had appointed Commissioners to delimit the boundary. The Commissioners prepared a Joint Report, with an accompanying map, and signed it on 17 February 1913. The two Governments agreed in the 1915 Agreement[35] to "confirm the aforesaid Joint Report and map". They then, in the Agreement, set out the text of the Joint Report.

90. The immediately relevant provisions are the introductory words of paragraph 3, and its first two subparagraphs. They are on the screen now, and at tab 4 in the judges' folders. They show that the Commissioners have determined the boundary as "taking the following course", which they go on to describe as follows:

> "(1) Traversing the island of Sibetik, the frontier line follows the parallel of 4° 10' north latitude, as already fixed by Article 4 of the Boundary Treaty and marked on the east and west coasts by boundary pillars.
>
> (2) Starting from the boundary pillar on the west coast of the island of Sibetik, the boundary follows the parallel of 4° 10' north latitude westward until . . ."

and then the text describes its further inland course.

91. What is apparent from this language is that the Commissioners simply *noted* the passage of the line across the island of Sebatik, as something settled previously — it had been "already fixed" by Article IV and "marked on the east and west coasts by boundary pillars". Their use of the word "Traversing" was simply a reflection of the fact that Article IV itself said that the line went "across" Sebatik.

---

[35] Memorial of Indonesia, Vol. 3, Ann. 118.

92. The Commissioners' own line did *not* start from that east coast. *Their* line started from the pillar on the *west* coast of Sebatik: the Report says so — "Starting from the boundary pillar on the west coast of the island of Sebitik".

93. Moreover, there was no need, or even physical possibility, for the Commissioners to do anything about the eastward extension of the Convention line out to sea. Their task was, in modern usage, to demarcate the boundary — they used natural features, coupled with four pillars; they explain that in paragraph 2 of the Report. But no demarcation can be carried out at sea, a parallel of latitude at sea does not need demarcating, and in any case, as I have said, a line of attribution calls for no demarcation at all.

94. In short, their task did not require them to look eastwards: their job was demarcation *westwards* from the stretch previously demarcated, which had ended at the western pillar on the island of Sebatik.

95. Mr. President, that brings me to the end of what I have to say on those two matters. I now thank the Court for its courtesy and patience, and may I invite you to call upon Professor Soons to continue this second round presentation of Indonesia's case.

Le PRESIDENT : Je vous remercie, sir Arthur. Je donne maintenant la parole au professeur Alfred Soons.

Mr. SOONS: Thank you, Mr. President. Mr. President, Members of the Court,

TERRITORY OF SULTAN OF BOELOENGAN

DISPLAYS OF SOVEREIGNTY BY THE NETHERLANDS

INTERNAL DUTCH DELIBERATIONS ON DELIMITATION OF THE TERRITORIAL SEA OFF SEBATIK ISLAND

1. It will be my task, in this second round of Indonesia's presentation, to briefly deal with three issues addressed by counsel for Malaysia during the first round: (1) Indonesia's position with respect to the title to Sipadan and Ligitan obtained through the Sultan of Boeloengan; (2) the Dutch exercises of sovereignty over Sipadan and Ligitan; and (3) the significance, for our case, of the internal Dutch deliberations in the 1920s on the delimitation of the territorial sea off Sebatik Island.

I. The Netherlands acquired title to Sipadan and Ligitan through the Sultan of Boeloengan

2. Counsel for Malaysia raised questions as to what Indonesia's position is with respect to claims to Pulau Sipadan and Pulau Ligitan as part of the territory of the Sultan of Boeloengan. My friend and colleague, Professor Schrijver, seemed to discern shifts in Indonesia's position on this issue (see CR 2002/30, p. 38), but that is not the case. I can be very short here, also in the light of Sir Arthur Watts's presentation just now. Indonesia clearly maintains the position it has taken throughout the written pleadings, and as also expressed during the first round by Professor Pellet and myself (CR 2002/27, pp. 31-34 and CR 2002/28, pp. 44-50). And that is that through contracts with the Sultan of Boeloengan, the Netherlands acquired title to Sipadan and Ligitan. However, as was common in this region at the time, the precise extent of the Sultanate's possessions was unclear. As a result, soon after the BNBC had established itself in North Borneo, it became apparent that the concession area the Company claimed and the territory claimed by Boeloengan overlapped. The area of overlap has been fully explained by Professor Pellet last Monday.

3. The very reason for the Dutch and the British to start the negotiations which led to the conclusion of the 1891 Convention was the uncertainty flowing from this overlap of claimed territories, and the 1891 Convention once and for all, and comprehensively, put an end to this uncertainty.

4. Malaysia states that there is no evidence at all through contemporary documents of Dutch claims specifically to the islands of Sipadan and Ligitan (CR 2002/30, p. 42). Mr. President, I submit that that is not a very helpful comment. Also the British did not mention during the negotiations specifically islands claimed by the BNBC — apart, of course, from Sebatik Island. It was understood by both States that offshore islands *were* included in the two claims involved and would *have* to be part of the settlement to be reached in the negotiations. I will come back to this issue of offshore islands claimed by the Dutch in a moment.

5. Finally, on Boeloengan, Professor Schrijver continues to refer to Boeloengan as a purely land-based Sultanate. We have already shown that this is simply incorrect, but I do not want to repeat myself. The coastal population of Boeloengan did participate in fishing and maritime trading. The Bugis, originally from Sulawesi but fully assimilated in the local communities, were

renowned — and still are — for their seafaring skills. I refer to our written pleadings and to what I said in the first round.

II. Displays of sovereignty over Sipadan and Ligitan by the Netherlands

(a) *Before 1891*

6. Mr. President, Members of the Court, I now turn to the more important issue of displays of sovereignty over the two islands by the Netherlands. According to counsel for Malaysia, there was no exercise of jurisdiction by the Netherlands over Sipadan and Ligitan prior to 1891 (CR 2002/30, p. 45). However, the activities of the *Admiraal van Kinsbergen* in 1876 indicate something different. As mentioned earlier, on 10 June 1876 this warship, patrolling the area, landed an armed sloop on Maboel Island. It took a proa from the island, which it returned the following day (Counter-Memorial of Indonesia, Vol. 2, Ann. 12). This incident proves, first of all, that, contrary to what Malaysia argues (Mr. Schrijver, CR 2002/30, pp. 43-44; Mr. Crawford, CR 2002/30, p. 54), the Dutch were present *east* of Batoe Tinagat, as can be seen on the map now shown on the screen; it is in the judges' folders under tab 5. The island of Maboel is at the same latitude as Batoe Tinagat: 4° 14' N latitude. It is approximately 39 nautical miles east of Batoe Tinagat. Thus, the Dutch did exercise territorial jurisdiction east of Batoe Tinagat.

7. Secondly, it shows a Dutch claim to offshore islands in St. Lucia Bay — the northern shore of St. Lucia Bay that is — a Dutch claim to an island close to Sipadan, but 8 nautical miles to the north of that island. If this incident proves anything, it is in any case that there were claims to offshore islands in the area which were a potential source of disputes that needed to be resolved.

8. The *Admiraal van Kinsbergen* was not the only Dutch warship patrolling this part of the Dutch East Indies. Since 1879 the Dutch permanently had a cruiser stationed near the mouth of the Tawau River, operating from Tarakan, specifically as a reaction to BNBC activities potentially encroaching upon Dutch territory.

9. In 1883 there was another incident involving Maboel Island, to which Indonesia has referred in its Reply (Reply of Indonesia, para. 1.41, and Reply of Indonesia, Vol. 2, Ann. 2). A copy of the relevant document is in the judges' folders under tab 6. In October of 1883 an unnamed Dutch warship was reported by BNBC officials as having been engaged in policing the

waters very close to Maboel, where she even seized a native boat. The correspondence refers to more such Dutch patrols in that period. Again, this shows exercise of jurisdiction by the Dutch east of Batoe Tinagat — contrary to what our opponents maintained.

10. Turning now to the period after 1891 — or, perhaps I should say, after 1892, since the Convention only entered into force in May 1892 —, I would like to distinguish between two categories of activities: hydrographic surveying and naval patrols.

(b) *Hydrographic surveying*

11. I will first deal with hydrographic surveying activities, that is: the collection of data at sea for the production of nautical charts. Charts, I might add, are depictions of parts of the ocean specially created for mariners, for the safety and efficiency of navigation. In order to avoid any misunderstanding, I want to be more precise about Indonesia's position with respect to the significance of hydrographic surveying activities as display of State functions, or evidence of sovereignty, in general. Indonesia of course is not saying that *publication* of nautical charts of an area means a claim of sovereignty to islands or other territory shown on the chart. But what matters here is the effort of the collection of the data at sea. The main point that Indonesia has stressed here is that the Dutch went to the area around Sipadan and Ligitan to collect their own data, and did not rely solely on data provided by the British who had also surveyed the northern shore of St. Lucia Bay. The Dutch Navy evidently did this because the Netherlands both considered itself responsible for maintaining reliable charts of the area, and felt the need for itself to have detailed hydrographical information of the areas surrounding the Dutch islands located south of 4° 10' N latitude, the 1891 Convention line.

12. As appears from the ship's commander's report (Memorial of Indonesia, Vol. 3, Ann. 105), the *Macasser* surveyed the area around the two islands in 1903. The resulting chart No. 59 was published and maintained by the Netherlands Hydrographic Service. Indonesia has in its Memorial referred to a Memorandum on Hydrographic Surveying Activities by the Royal Netherlands Navy in the Netherlands East Indies, dated 16 February 1948; it is Annex 127 of the Indonesian Memorial. From this Memorandum it appears, *inter alia*, that the Dutch themselves corrected the data from British charts for the north-eastern part of chart 59, that is the area

surrounding Sipadan and Ligitan, based on their own data. The Memorandum also explicitly states that the Dutch continued their detailed hydrographic surveying off the north-eastern Borneo coast during the period 1901-1903, and I quote from the English translation of an excerpt from the Memorandum: "until the British boundary (4° 10' N)". From the report of the *Macasser*'s commander we know he understood that as including the offshore areas around Sipadan and Ligitan.

13. Notwithstanding my explanation in the first round last Monday, Malaysia still raises the point of the boundary line occurring on this chart No. 59, issued in 1905, which is shown on the mainland of Borneo and Sebatik Island. Professor Schrijver asks again: how can the boundary line on Borneo be explained? How can the boundary line on the island of Sebatik be explained? Well, it is quite simple. Published charts generally showed the land boundaries on the mainland, but did not indicate maritime boundaries or territorial allocation lines, or identified for each and every island in the sea to which State it belonged. Thus, there is nothing significant in this chart correctly depicting the land boundary on Borneo, including Sebatik, and nothing more. It would have been strange if it had depicted more. The information on the chart says nothing about sovereignty over Sipadan or Ligitan.

14. Finally, I think it is appropriate under this heading to deal with a question raised by Professor Cot. He referred to the activities of the Dutch ship *Banda* in 1891, as contrasted with those of the British ships *Egeria* and *Rattler*, and he wondered why I had not mentioned the *Banda* (CR 2002/31, pp. 29-31). Well, again, it is quite simple: much as I would have loved to mention her exploits, I did not, because they had nothing to do with Sipadan and Ligitan.

15. The *Banda* went there, to Sebatik Island, specifically for the project of determining and demarcating, jointly with the Royal Navy, the exact location of the boundary which had in principle been agreed during the Anglo-Dutch negotictions: that is, the intersection of the 4° 10' line with the coast of mainland Borneo and the island of Sebatik. The three ships had the task to do this there on the spot — there were no other intersections of the Convention line with land or islands to be determined by them. And this is precisely what the *Banda* did in June 1891.

16. In contrast to the *Banda*, the *Egeria* had another mission as well. She carried out a major hydrographic survey of the coastal areas off the State of North Borneo. She went where she had to

go for that purpose. Incidentally, it is interesting to note from the map shown on Friday by Malaysia depicting the voyages of the *Egeria* in 1891 — you find it in the Malaysian judges' folders under tab 26 — that, while the *Macasser* in 1903, as we have seen surveyed closely around Sipadan and Ligitan, and the other nearby islands like Maboel, the *Egeria* did not survey close to the Dutch coastal islands. Of course not: the British had no interests there, no need for data, no responsibilities. But the Dutch went far offshore from the mainland, to Sipadan and Ligitan, their islands.

17. Mr. President, just one quick last little point on the *Banda* to wind up this story. After the *Banda* had completed her work, she immediately returned to Soerabaja, the central naval base in the Netherlands East Indies on east Java. Soerabaja is still called Surabaya, and is not the previous name of present Jakarta as Professor Cot thought (CR 2002/31, p. 30).

(c) *Dutch law enforcement/naval patrols*

18. Mr. President, Members of the Court, I now turn to the law enforcement and naval patrols by the Royal Netherlands Navy. Indonesia is not hiding away from the fact that only a few instances of such patrols specifically including Sipadan and Ligitan can be shown. But the evidence provided here should be seen in its context.

19. First, it is important to stress that the Dutch Navy in the East Indies had a huge geographical area to control; you will have seen enough maps of Indonesia by now, to be familiar with the area. But there were limited resources available, and these resources had to be deployed according to priorities. Sipadan and Ligitan were at the outer limit of Dutch possessions, they were small and uninhabited.

20. In this light, Professor Crawford's suggestion on Friday (CR 2002/31, p. 42) that after 1891 the Dutch should have established a naval base in the vicinity of Sipadan and Ligitan is baffling. One could have equally asked: Why did the British not do so? At least the Dutch sent naval patrols — what the British never did. Taking into account the factors I just mentioned, it is remarkable what effort the Dutch made. To show that the Dutch were indeed regularly present in this area, Indonesia submitted the list of ships of the Royal Netherlands Navy which were present off the coast of North-East Borneo during the period 1895-1928 (Counter-Memorial of Indonesia,

Vol. 2, Ann. 32). This list was compiled from the Annual Reports on the Colonies, submitted to Parliament by the Dutch Government. To answer the question why this list stops in 1928, I can inform the Court that after that year the Reports on the Colonies no longer included this information.

21. However, the mission reports or patrol reports of these ships are no longer available. I can only repeat that the archives for this period of the Commander Naval Forces Netherlands East Indies, where these reports were kept, do not exist anymore in Indonesia. Of some of these ships the logbooks are available in the archives in the Netherlands, but not, as Malaysia seems to suggest, all of them: in fact, only a minority of these logbooks have survived. For example, the logbook of the *Lynx* — and you can imagine we have searched for that — for 1921 is not there. Incidentally, Professor Schrijver must be mistaken in his reference to a "huge archive of the Netherlands East Indies twentieth century administration, located in Bogor" (CR 2002/31, p. 60). This part of the National Archives of Indonesia, concerning the General Secretaria of the Netherlands Indies Government and *not* the Navy Department, has been moved to Jakarta some years ago. As I mentioned earlier, the Navy archives were destroyed in 1942.

22. Malaysia tries to create the impression that complete archives exist, still containing all documents that ever existed and were relevant to our case. But that would be a complete distortion of reality. In reality there are significant gaps, as any expert in these matters will point out. To give another example: the archives of the local Dutch administration in Tarakan, the Dutch administrative centre closest to our islands, were also destroyed during the war. Indonesia had chosen not to devote special attention to these facts in its written pleadings. But I could not keep silent on this now, provoked by the misleading statements on Friday by counsel for Malaysia. Perhaps this is an appropriate moment for us to break, Mr. President.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur le professeur. La séance de la Cour est suspendue pour une dizaine de minutes.

L'audience est suspendue de 11 h 30 à 11 h 40.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et la parole est au professeur Soons.

Mr. SOONS: Thank you, Mr. President.

23. Mr. President, Members of the Court, I now turn to the actual *effectivités*. Professor Schrijver mentioned again the *Koetei* (CR 2002/31, pp. 58-59). According to Indonesia, her trip in 1910 is an example of a Dutch warship not staying close to the shore, when she reached Sebatik Island where the land boundary and consequently the territorial sea boundary with British North Borneo was located. From there she went offshore, across St. Lucia Bay towards Sipadan and Ligitan. Professor Schrijver stated that evidently the ship passed "the boundary", but there is no evidence for that. And what would it mean anyway? I simply do not understand what significance he attaches to the events he quoted; I hope he realizes that the ship's logbook mentions anchoring at the boundary *west* of Sebatik Island.

24. Then we come to the series of patrols of the *Lynx* and her seaplane to Sipadan and Ligitan in November and December 1921. Here, Malaysia remains remarkably silent. The ship's exploits are acknowledged and then simply dismissed by Professor Crawford and Professor Schrijver (CR 2002/31, pp. 59-60). They attempt to lay a smoke-screen over this highly important episode, because they are embarrassed by it. They have nothing to say, and therefore attempt to downgrade it. But this episode has to be taken seriously, and deserves careful, cool, clinical analysis.

25. Mr. President, Members of the Court, Malaysia did not even bother to answer the specific questions I asked about the significance of the various law enforcement actions undertaken by the destroyer and its seaplane. We may therefore take it that it has no other answers than offered by Indonesia.

26. Commander Smit of the *Lynx* had clear instructions from the highest naval commander in the Netherlands East Indies that islands to the south of the 1891 Convention line of 4° 10' N latitude should be regarded as Dutch, and islands to the north as belonging to British North Borneo. Accordingly, he visited Sipadan and even landed armed personnel there to search the island — an operation which would have taken a few hours to complete —, but stayed outside the territorial sea

of the British island of Si Amil. The seaplane repeatedly flew over Sipadan and Ligitan, but stayed outside the 3-mile limit of Si Amil.

27. Malaysia argues that this was an anti-piracy operation and therefore entailed no implications for sovereignty. This is a puzzling statement, and is difficult to react to because no arguments are advanced.

28. British North Borneo Company officials were notified at various levels, including directly by the commander of the *Lynx*; no objections to her activities were ever raised by the British.

29. Professor Schrijver mentions that the *Lynx* report makes frequent reference to the Sulu Islands and Sulu (CR 2002/31, p. 59). So what? The pirates came from the Sulu Islands — that is, the real Sulu Islands, and not those islands newly styled by Professor Schrijver by that name — the Ligitan Group — and it is recorded that they returned there.

30. He also posed the question how often the commander of the *Lynx* in his report made a reference to the 4° 10' line. The answer is indeed: not a single time. But why would he? He knew his instructions from the Commander Naval Forces Netherlands East Indies to whom his report was addressed and applied them in practice, scrupulously. And we know from the correspondence of his commander, the admiral, that he, as far as the territorial sea boundary off Sebatik Island was concerned, had specifically referred to the Convention line (Counter-Memorial of Malaysia, Vol. 2, Ann. 4).

31. In addition, counsel for Malaysia stated that Indonesia has *only* the *Lynx*. Referring to *effectivités* that could be invoked by Indonesia, Professor Crawford emphatically used the name of the ship, apparently now also dear to him, and repeated it three times in just one very short sentence to convey this view (CR 2002/32, p XX). However, when it comes to such displays of sovereignty by Malaysia's predecessors in alleged title, I would be tempted to summarize those by: nothing, nothing and nothing. The BNBC did not perform a single act on the ground. As Professor Pellet will explain this afternoon, Malaysia has no *effectivité* at all. Only Indonesia's predecessor in title has actually physically exercised sovereignty over the two islands: landing the armed sloop on Sipadan, and overflying both islands.

32. Mr. President, I will of course not go over again the exploits of the *Lynx* and its seaplane. We have included the two photographs in the judges' folders at tab 7. There is one additional point for the record: on Monday I did not mention one other trip of the seaplane to Si Amil. On the screen you now see the map depicting that trip. It is in the judges' folders under tab 8. In fact, this was its first reconnaissance trip, on which it also landed for the first time outside the territorial sea of Si Amil where it had spotted the pirate fleet, and the plane's pilot talked to the supposed head of the pirate fleet. You will find the full story in the report of the commander of the *Lynx* (Memorial of Indonesia, Vol. 4, Ann. 120.

33. After this expedition, no further law enforcement patrols by the Dutch Navy to Sipadan and Ligitan have been reported. To the best of our knowledge, no piracy incidents were reported here after 1921. In fact, the *Lynx* report mentions how effective its operation was. But also for any further demonstrations of sovereignty there was no need: the BNBC had not protested, and no dispute existed with respect to sovereignty over the two islands.

34. In conclusion, the series of patrols of the *Lynx* and its seaplane over a period of two weeks in 1921 constitute the clearest possible public and physical display of State functions by the Netherlands over Sipadan and Ligitan, thereby confirming Dutch title to the islands as allocated by the 1891 Convention.

III. The internal Dutch deliberations on the delimitation of the territorial sea off Sebatik Island

35. Mr. President, Members of the Court, I now turn to my third and last topic, the internal Dutch deliberations in the 1920s on the delimitation of the territorial sea off Sebatik Island. Counsel for Malaysia were surprised to learn that these are regarded by Indonesia as totally irrelevant for our case. Professor Schrijver states that Indonesia neglects totally that these deliberations were triggered by the *Lynx* activities in the neighbourhood of Sipadan (CR 2002/31, p. 61). But his version of what provoked the discussions is evidently inaccurate. The relevant correspondence contained in the record shows that the discussion was triggered by questions raised about the territorial sea boundary in Cowie Bay (Counter-Memorial of Malaysia, Vol. 2, Ann. 4). On his initial patrols along the coast of Boeloengan, the commander of the *Lynx* had been confronted with unclarity about the exact limits of the Dutch territorial sea off Sebatik Island, in

case he would have wanted to arrest pirates. During the subsequent discussions in the 1920s, there was in particular concern about the future maintaining of neutrality in these waters, so close to the important Dutch oil port of Tarakan.

36. This can be inferred from the letter dated 10 December 1922 of the Governor-General of the Netherlands East Indies to the Minister for the Colonies in The Hague (Counter-Memorial of Malaysia, Vol. 2, Ann. 4), in which he brings the matter of the territorial sea delimitation for the first time to the attention of the Minister.

37. It can be seen clearly from the sketch used in the deliberations, and the new sketch made by Malaysia, now shown again on the screen, that these discussions involved just a tiny area off the coast of Sebatik: the only location where a delimitation of territorial sea was called for.

38. Unfortunately, Mr. President and Members of the Court, counsel for Malaysia did not react to my explanations given in the first round on the significance of these deliberations, but keeps asking the same questions as in Malaysia's written pleadings. I therefore feel compelled to try one more time to explain what the real meaning was.

39. Professor Schrijver asked four questions, intended as rhetorical, and each time he asks if the facts he notes are indeed "totally irrelevant" as Indonesia had stated in its Reply and I had confirmed on Monday. The answer to each of his four questions is: yes. They are irrelevant for our case, which is about the nature of the line established by the 1891 Convention for the area east of Sebatik Island, beyond its territorial sea, which Indonesia submits is an allocation line. And I will explain again.

40. His first question concerned what triggered the internal Dutch deliberations. And I have already answered that question a moment ago. It is not what he says it did.

41. His second question was, if it was totally irrelevant that in 1922 the Commander Naval Forces Netherlands East Indies preferred the perpendicular line rather than the continuation of the land boundary. Yes, for our purposes it was. There were two options, and he, the admiral, — and rightly so — preferred this one. The application of the general rule of international law, which had the effect of ensuring that the sea area in front of the coast was subject to the sovereignty of the same State. Such a territorial sea boundary left the Convention line intact further offshore as the allocation line. This can be deduced from the fact that not a single official involved in the internal

Dutch deliberations questioned the actions by the commander of the *Lynx* with respect to Sipadan, Ligitan and Si Amil, and they all had had a copy of his report. The Admiral, however, out of caution had instructed the *Lynx* to stay south of the Convention line in Cowie Bay since he was not sure the British would accept the perpendicular line as the boundary, and this was precisely why he started the discussion on this issue. He wanted clarity for future patrols near Cowie Bay, and for the maintaining of neutrality if necessary.

42. His third question, as rephrased by me, was whether it was not strange that nobody involved in the deliberations during the 1920s had referred to the existence of the allocation line. Well, of course not. The discussions dealt with the territorial sea delimitation off Sebatik Island, in Cowie Bay; the record explicitly says so, and the sketch we have seen confirms this; they were not concerned with any outlying islands located beyond the territorial sea.

43. The fourth question concerns a remark made by the Resident of the Southern and Eastern Division of Borneo, stationed in Banjermasin, in a letter to the Governor-General on this issue. That remark, to the effect that there were no islands beyond Sebatik, made by someone stationed more than 900 km to the south of Sebatik, only shows again that there were no islands close enough to the eastern shore of Sebatik Island which should have been taken into account in a territorial sea delimitation with British North Borneo.

44. We know the outcome of this story. The perpendicular line was regarded as the right one to apply, but the matter was not considered worth discussing with the British. End of story. The internal Dutch deliberations were irrelevant for the issue of title to Sipadan and Ligitan.

45. Mr. President, Members of the Court, this has brought me to the end of my second round presentation. I thank you again for your patience and attention, and would like to ask you, Mr. President, to invite my colleague, Mr. Bundy, to the podium to continue Indonesia's presentation.

Le PRESIDENT : Je vous remercie, Monsieur le professeur, et je donne maintenant la parole à M. Rodman R. Bundy.

Mr. BUNDY: Merci, Monsieur le président.

REBUTTAL OF MALAYSIA'S CHAIN OF TITLE ARGUMENT

1. Mr. President, Members of the Court. At this stage of Indonesia's rebuttal, it is appropriate to return to Malaysia's basis of its claim to Sipadan and Ligitan based on its chain of title theory. That will be my task in the remaining time this morning, and in so doing, I will respond to principally to arguments that were advanced last Thursday and Friday by Professor Crawford.

2. Once again, a preliminary comment is called for. It is that Malaysia bears the burden of proving that four separate entities — the Sultan of Sulu, Spain, the United States and Great Britain — *each* had a valid title to *both* of the islands during the relevant period for Malaysia's case to succeed. Having listened with great care to what Malaysia had to say about each of these entities last week, our opponents, in my submission, are nowhere nearer to sustaining that burden today than they were one week ago. The evidence simply is not there to support any of the links in the Malaysian thesis.

A. Malaysia's failure to demonstrate that the Sultan of Sulu had title to the islands

3. Let me start with the Sultan of Sulu. Counsel apparently thought it inappropriate for me to refer to the Diplomatic Note of 5 April 2001 sent by the Philippines in which the Philippines expressly disclaimed having any territorial interest whatsoever in Sipadan or Ligitan (CR 2002/30, p. 55). That Note is clearly relevant. The issue is not whether the Philippines claim to a portion of Sabah is "plausible" or not. That is not an issue that the Court has to decide. The important point is that the Philippines has made it very clear that it maintains a claim to all territories to which it considers it has an historic title, but at the same time, the Philippines has made it equally clear that it does not maintain a claim to Sipadan and Ligitan, and therefore that it did not consider either of those two islands to have fallen within the Sultan of Sulu's domains. Otherwise, the Philippines would have claimed them. Given that one of the issues before this Court is whether the Sultan of Sulu's possessions included Sipadan or Ligitan, the Philippines view on that issue is relevant, particularly in the light of its unique relationship as the successor to the Sultan.

4. Counsel would have preferred it if I had referred to what he called "contemporary documents". I would have done so, Mr. President, if there had been anything of any substance to refer to. But there is not. Let me take the five so-called contemporary examples that counsel referred to in his presentation last week (CR 2002/30, pp. 52-53).

(1) There is the account of Hunt written in 1837. The date of that entry in itself is perplexing if we are speaking of contemporaneity. It was published 54 years before the 1891 Convention was signed. In a report of 30 densely written pages on Sulu, counsel relies on a mere six words — for that's all there is. In speaking of the coast off the Going River — and the Going River is located at the back of Darvel Bay, north of our area of concern — but in speaking of that area, Hunt writes: "Pulo Giya, off this coast, abounds with deer, Semperan with abundance of green turtle" (Memorial of Malaysia, Ann. 34). That's it. Apart from the misspelling of the island, and its misidentification in Darvel Bay, those mere six words are scarcely compelling evidence of Sulu sovereignty over Sipadan and Ligitan.

(2) There are the 1855 "Notes on Borneo" written by the Dutch official von Dewall (Reply of Indonesia, Ann. 1). There is no mention of either Sipadan or Ligitan in this document. In contrast, there is a clear account that the northern point of the boundary for the Dutch on the east coast of North Borneo was fixed at the 4° 21' N latitude. There is also an interesting entry in von Dewall's accounts stating that this coast came under the tributary of the Sultan of Sulu "in name only".

(3) Counsel argued that so-called "agents" of Sultan exercised authority over the island Omadal. But if reference is made back to the document which was cited in support of this proposition, once more, no mention of Sipadan or Ligitan will be found (Memorial of Malaysia, Ann. 76).

(4) There is the unofficial and privately prepared 1870 Dutch map to which reference was made (Memorial of Malaysia, Atlas, map 3). This did not place the geographic features depicted on the map in even remotely the correct place; it is a very inaccurate map. And the islands are not necessarily indicated as being Sulu.

(5) Counsel contends that the Dutch Government, in response to questions raised in Parliament, affirmed that it "never disputed the activity of Spain over the dependencies of Sulu in the north-east portion" of Borneo. Apart from the fact that there was again no mention of Sulu

sovereignty over Sipadan or Ligitan, the reference was totally unspecific as to what was comprised within the "north-east portion" of Borneo (Memorial of Malaysia, Ann. 51). As Indonesia has demonstrated, and as Sir Arthur again referred to this morning, the background to the 1891 Convention reveals that its whole purpose was to resolve once and for all uncertain and overlapping claims in the area.

5. Can it really be said that these five items referred to by counsel establish the existence of the Sultan of Sulu's sovereignty over Ligitan or Sipadan? One begins to see, I think, why the Philippines did not consider that it had a claim to either island based on the historical domains of the Sultan.

B. Malaysia accepts that Spain was utterly indifferent to the islands

6. I now turn to the position of Spain. The Court will recall that, in my first round presentation, I pointed out that Malaysia itself, on numerous occasions in its written pleadings, had admitted that Spain had no interest or claims to islands lying as far south as Sipadan or Ligitan (CR 2002/28, pp. 48-49). Indeed in 1903, a British North Borneo official even went so far as to write to the Governor of North Borneo stating that the "Spanish never claimed or exercised sovereign rights" on the islands (Memorial of Malaysia, Ann. 57).

7. Malaysia made no attempt, last week, to deny these facts. In fact, counsel agreed. To quote his words: "Spain did nothing" (CR 2002/31, p. 42). And despite that admission, Malaysia still invites the Court to find that Spanish sovereignty over Sipadan and Ligitan was firmly established during the last 22 years of the nineteenth century. It certainly would have surprised Spain at the time to learn that it possessed sovereignty over such extensive tracts that it had never claimed, nor occupied and as to which it had never exercised any authority. Nonetheless, the proposition that Spain held title to the islands is an indispensable component of Malaysia's case and its chain of title theory. Because without it, Malaysia's title fails. As Judge Huber stated in the *Island of Palmas* case: "It is evident that Spain could not transfer more rights than she herself possessed." (II *UNRIAA* (1928), p. 842.)

8. Counsel tries to cure this lacuna by referring to the 1885 Protocol. Counsel's argument is that, by this instrument, Britain recognized Spanish sovereignty over all islands lying more than

9 miles from the coast down to the Sibuko River (CR 2002/30, p. 57). But this is to misread the actual text of the 1885 Protocol. It also ignores the fact that the Netherlands did not accept that Sulu territory extended as far south as the Sibuko River. By 1885, as Professor Soons has explained, the Dutch had already installed themselves as far north as Batoe Tinagat and had sent armed troops to the island of Mabul (see, also, CR 2002/27, pp. 47-48.) Moreover, the 1885 Protocol was not binding on the Netherlands in any event, because it was not a party to it.

9. Under Article I of the Protocol — and this is an article that Professor Crawford did not bother to cite — Great Britain only recognized Spanish sovereignty over places *effectively* occupied or not yet occupied by Spain in the Sulu Archipelago. With respect to places *not* yet occupied, under Article IV of the Protocol, Spain was under an obligation to notify Britain of any effective occupation that it undertook afterwards. We heard from Professor Crawford that Spain did nothing, it was totally inactive in the area. There was no Spanish occupation of the disputed islands in 1885 and there was no Spanish occupation that was notified to either Britain or Germany — the other parties to the 1885 Protocol — any time thereafter. Consequently, there was no recognition of Spanish sovereignty over any islands stretching down to the Sibuko River under the actual terms of the 1885 Protocol.

10. In addition, it is a fact that the Protocol itself makes no reference to the Sibuko River. It simply repeats the formula that had appeared in the 1836 Capitulation that the Sulu Archipelago extended from the western point on Mindanao to the island of Palawan — which is way to the north — and to Borneo. But it said nothing about the southern extent of the Archipelago.

11. That problem — the southern extent in the 1885 Protocol — was specifically referred to in a letter that the United States Secretary of State sent to the British Ambassador in Washington in 1904. In that letter, the Secretary of State noted: "[T]he protocols are silent as to the points of the North Bornean coast where the 3-league line begins and ends." (Memorial of Malaysia, Ann. 65.) On that point, it is worth recalling that the 1927 *Universal Illustrated Encyclopaedia of Spain* — that Indonesia produced with its written pleadings — placed the southern limits of the Sulu Archipelago at the 4° 40" N latitude, in other words, the latitude of the island of Sibutu (Memorial of Indonesia, Ann. 124). And it is also worth recalling that the Secretary of State of the

United States had voiced the opinion in October 1903 that Sibutu Island represented the limit of Spanish possessions in the area (Memorial of Indonesia, Ann. 104).

12. Further evidence of what Spain and the United States considered to be the limits of Spanish possessions in the area is provided by examining the extent of the territory that Spain ceded to the United States under the 1898 and 1900 Treaties. This involves the third link to Malaysia's chain of title argument to which I will now turn.

C. The United States did not inherit Sipadan or Ligitan from Spain

1. The 1900 Treaty

13. From Malaysia's first round presentation, it is pretty clear that Malaysia is distinctly uncomfortable about the role that the 1900 Treaty plays in this case.

14. The distinguished Agent for Malaysia stated that: "Sovereignty over the Ligitan Group was acquired as a result of treaties between Great Britain and the United States in 1907 and 1930." And he added: "An earlier treaty, the Madrid Protocol with Spain in 1885, was essential background to these two treaties." (CR 2002/30, pp. 14-15.) Surprisingly, the Agent made no reference to the 1900 Treaty.

15. Sir Elihu followed the same course. In discussing Malaysia's chain of title, he too referred to the 1885 Protocol, the 1907 Exchange of Notes and the 1930 Anglo-American Convention. Once again, the 1900 Treaty was conspicuously missing from this chain (CR 2002/30, pp. 34-35).

16. When it came to Professor Crawford, he too gave very short shrift to the 1900 Treaty. On Thursday afternoon, he led off his discussion of the process by which Malaysia is said to have acquired title to the islands by referring to a series of transactions in the period from 1885 to 1930. Well, what were those transactions? In Professor Crawford's words:

> "They were the Tripartite Protocol between Britain, Germany and Spain of 1885 — sometimes referred to as the Madrid Protocol —, the Anglo-American Exchange of Notes of 1907 and the Anglo-American Boundary Convention of 1930." (CR 2002/30, p. 49.)

17. Mr. President, is there something wrong with the 1900 Treaty? Can it be mere oversight that in all three of these presentations the 1900 Treaty is strangely absent? Malaysia seems to avoid it like the plague.

18. To be fair, Professor Crawford finally got around to mentioning the Treaty in a couple of sentences on Friday. But counsel offered absolutely no response to the reference in the Treaty providing that it dealt particularly with the islands of Cagayan Sulu and Sibutu and their dependencies (CR 2002/30, pp. 44-45). Nor did he address the opinion that was voiced by the United States Secretary of State in his letter of 23 October 1903 in which the Secretary of State observed: "The Treaty of Nov. 7, 1900, by expressly including the Island of Sibutu may have intended such inclusion as exceptional and as a limit to the claims of Spanish dominion to the southwest of the Sulu group".

19. As I showed in my first round presentation, the consistent position of the United States after 23 October 1903 was that Sibutu Island was the south-westernmost island of the Philippine group that the United States had laid claim to on the basis of the possessions it had inherited from Spain. *No claim* was ever advanced afterwards to islands south of Sibutu, including Sipadan and Ligitan.

20. Apart from these considerations, there is a further official map prepared by the United States, and submitted as part of the United S'ates pleadings in the *Island of Palmas* case, which supports Indonesia's position. This map was included in Indonesia's Atlas as map 8, and it also may be found in the judges' folders under tab 9. [Place map 8 from Indonesian Atlas on screen.]

21. The map depicts the extent of the possessions that the United States con...dered it had inherited from Spain under the 1898 and 1900 Treaties. You can see the two boxes around Sibutu Island and Cagayan Sulu and their dependencies represent the additional islands that were not included in the 1898 Treaty, but which were covered by the 1900 Treaty. Note, if you would, Mr. President and Members of the Court, that the United States was under no illusion that it had acquired any islands south of Sibutu. [Enlarge map on screen.] This can be seen on the enlargement of the map, which you also have in your folders. Sipadan Island falls well to the south-west of the United States claims.

22. It is worth emphasizing that this map was introduced by the United States in arbitral proceedings against the Netherlands. And the Netherlands was thus entitled to rely on it as an accurate depiction of any US claims that might affect the Netherlands interests. The Netherlands would have concluded from the United States presentation of this map that the United States made no claim to Sipadan or Ligitan.

23. The truth of the matter is that the 1898 Treaty of Peace between the United States and Spain had inadvertently neglected to include either Sibutu or Cagayan Sulu amongst the possessions that were transferred by Spain. And the whole purpose of the 1900 Treaty was to rectify that omission. But it came at a price. As recorded in the 1900 Treaty itself, the United States was obliged to pay Spain $100,000 for the inclusion of these two islands in 1900.

24. The pleadings filed by the parties in the *Island of Palmas* case are kept just upstairs in the records of the Permanent Court of Arbitration. If one consults the submissions of the United States in that case, as Malaysia in its written pleadings has said that it has done (Counter-Memorial of Malaysia, para. 5.13), one is left with no doubt as to the fact that Sibutu Island and Cagayan Sulu were the sole focus of the 1900 Treaty. Indeed, the Award in the case makes this clear. It is just after the portion of the Award where Judge Huber stated that Spain could not transfer more rights than she herself possessed. He went on to say the following:

> "This principle of law [i.e., the principle that Spain could not transfer more than it had] is expressly recognized in a letter dated April 7th, 1900, from the Secretary of State of the United States to the Spanish Ambassador in Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris [the 1898 Treaty] were to be considered as included in, or excluded from the cession". (*Island of Palmas* case, II *UNRIAA*, p. 842.)

25. The two islands referred to by Judge Huber were Sibutu and Cagayan Sulu.

26. Subsequently, in the negotiations with Great Britain leading up to the 1930 Convention, the United States was also to claim the Turtle and Mangsee Islands lying much further north off the coast of Borneo. But with respect to the Netherlands and Great Britain, the United States made no claims to islands lying south of Sibutu.

27. With respect to the 1900 Treaty, counsel for Malaysia asked, "where were the Dutch?" Helpfully, he then immediately provided the answer: He stated "They were not concerned."

(CR 2002/31, p. 45.) That, Mr. President, is correct. Why should they have been? The 1900 Treaty dealt with islands lying well to the north of the 4° 10' parallel of latitude.

28. That point was also made abundantly clear in correspondence contemporaneously exchanged between the Dutch Ambassador in Madrid, who was following these developments between Spain and the United States very closely, and the Dutch Foreign Minister. (See Counter-Memorial of Indonesia, Anns. 28 and 29.) On 3 March 1900, the Dutch Ambassador in Spain reported back to The Hague that Sibutu and Cagayan Sulu both lay outside the scope of the 1898 Treaty. He concluded, however: "This territory does not lie in the immediate proximity of the Dutch-Indies' possessions, but between British North Borneo and the Philippines." (Ann. 28.) The Dutch Foreign Minister agreed with this assessment. He wrote back: "From this it became clear to me that the United States had not yet abandoned their fancied claims to these islands [Sibutu and Cagayan Sulu] and that these are not located in the vicinity of our Colonies." (Ann. 29.)

2. The events of 1903

29. I now come to the events of 1903. Here, Malaysia has had to undertake a hasty damage control mission. This has been necessary as a result of the complete discrediting of the two main items of evidence adduced in support of Malaysia's claim — the mission of Lt. Boughter with the *Quiros*, and the provisional map issued by the United States Hydrographic Office in the summer of 1903.

30. First of all, as to the voyage of the *Quiros*, Professor Crawford insists that the United States did not disavow Lt. Boughter (CR 2002/31, p. 44). That assertion is not supported by the evidence — evidence which counsel neglected to refer to. The fact of the matter is that on 2 March 1904, the Secretary of State of the United States wrote to the Secretary of the Navy suggesting that an order be given to United States Naval officers in the region "to abstain from any assertion of our sovereignty" (Memorial of Indonesia, Ann. 106). And nine days later, on 11 March 1904, the Secretary of the Navy instructed Lt. Boughter's superior officer in the Pacific to refrain from any assertions of sovereignty (Memorial of Indonesia, Ann. 107). Now that correspondence hardly represents an endorsement of Lt. Boughter's claims.

31. Counsel also insists that the United States did assert claims to islands south-west of Sibutu and that it did negotiate those claims (CR 2002/31, p. 44). But where are those assertions of claims, and where are the negotiations that dealt with Sipadan and Ligitan? They are not in the documentation that accompanied the negotiation of the 1907 Exchange of Notes, and they are not in the records of the discussions leading up to the conclusion of the 1930 Convention. If Malaysia can point to a single instance where the United States claimed sovereignty over Sipadan or Ligitan after the Secretary of State's letter of 23 October 1903, it should produce that evidence on Wednesday, because it has not done so thus far. Regardless of whether the British may have felt that they — the British — might not be able to claim title to islands lying more than 9 miles from the Borneo coast, the United States did not make any claim.

32. The second piece of evidence relied on by Malaysia as a centrepiece of its claim is Chart 2117 prepared by the United States Hydrographic Office. I confess that I was astonished when Professor Crawford, in his map presentation on Friday afternoon, again produced the version of the chart with the boundary line drawn around Sipadan and Ligitan and complained that Indonesia treated this chart as irrelevant (CR 2002/32, p. 39, para. 62, Mr. Crawford).

33. Mr. President, the map *is* irrelevant. It was the subject of the Secretary of State's clear instructions in October 1903 to delete the boundary line and it was rapidly replaced with a second edition of the map which showed no boundary line. [Place second edition map on screen.] That is the second edition and that is the map that counsel should have shown.

34. Professor Crawford claimed that the only reason why the United States did not go ahead and disseminate the provisional version of the map was because Great Britain had urged that some agreement be entered into and the United States had indicated that it was amenable to the suggestion (CR 2002/31, p. 49). That is incorrect. The record shows unequivocally that instructions were given to delete the boundary line appearing on Chart 2117 on 25 November 1903, just one month after the Secretary of State's letter. You can see that if you look at the list of endorsements on the map that we have included at tab 10 of your folders (Reply of Indonesia, Ann. 5). The bottom endorsement, dated 25 November, represents the instructions to the Hydrographic Office to delete the boundary line. And that, that date — 25 November 1903 — was well before any suggestion had been made by the British to enter into negotiations with the United

States. In short, the United States reissued the final version of Chart 2117 on its own initiative. Not because of the British, but rather because the Secretary of State did not consider that the boundary line that had been placed on the provisional version of this map could be sustained. (The reissued map may be found as map 8 to the Reply of Indonesia, p. 116.)

35. That brings me to Map Hydrographic Office 529 subsequently published by the United States Hydrographic Office in order to illustrate its claims in the area. [Place map 9 from Indonesia's Reply on screen.] That map now appears on the screen. Other than to say that this map was probably prepared in the 1920s as a precursor to the 1930 Convention, counsel for Malaysia refused to discuss this map. He complained that Indonesia had not produced the full document or any provenance for it (CR 2002/31, p. 44).

36. You have the full document on the screen (Reply of Indonesia, map 9). Moreover, you have a stamp dated 1926 from the Library of Congress on the map. The map was deposited not only in the Library of Congress, but in the United States National Archives as well.

37. What is so mysterious about this map other than the fact that Malaysia does not like the limits of the United States jurisdiction in the Philippines which the map depicts? The map, at the top, refers to the Hydrographic Officer's Memorandum of 8 August 1903, a document which Malaysia itself produced with its written pleadings and to which Professor Crawford made reference last week (Memorial of Malaysia, Ann. 62). The map speaks for itself. The United States viewed the limits of its possessions in the Philippines as extending no further south than Sibutu Island. The red line on the map graphically illustrates this position. And as such, this map was no more than a confirmation of the United States position as it had been expressed in the Secretary of State's letter of 23 October 1903. It fundamentally contradicts Malaysia's argument that the United States claimed Sipadan or Ligitan or held title to either island.

3. The 1907 Exchange of Notes

38. I can now turn to the 1907 Exchange of Notes between the United States and Great Britain. Counsel for Malaysia concedes that the attention of the United States was focused at the time on the Turtle Islands lying well to the north (CR 2002/31, p. 43). Notwithstanding that

concession, counsel argues that the United States claim extended down to 4° N latitude and covered all the islands lying to the west of the so-called Durand line referred to in the Exchange of Notes.

39. Once again, I would submit that this hypothesis suffers from a failure to read the 1907 Exchange of Notes for what it is. Nowhere does the Exchange [illegible] the assertion of any United States claims, whether to the 4° N latitude or elsewhere. It [illegible] entire boundary issue on hold until a treaty could be negotiated, and it also expressly stipulated that any privilege of BNBC administration on islands lying to the west of the line did not carry with it any territorial rights.

40. Moreover, the United States and British documentation that I reviewed last week made it clear that the islands that were the subject of the 1907 Exchange were the Turtle Islands and the Mangsee Islands (CR 2002/29, pp. 13-14). Malaysia has offered no response whatsoever to that documentation.

4. The 1930 Anglo-American Convention

41. That brings me, Mr. President, to the final element of Malaysia's chain — the 1930 Anglo-American Convention. Counsel for Malaysia acknowledged that the Turtle Islands and Mangsee Islands were affected by this Convention. And he further admitted: "It is true that the United States evinced no interest over the more southerly islands, which from its point of view were very minor features." (CR 2002/31, p. 52.) Why the more southerly features were any more minor than features such as the Mangsee Islands, which are very small, was not explained.

42. Without explaining this, counsel went on to suggest, without any evidence whatsoever, that the United States ceded to Great Britain the southerly islands, including presumably Sipadan and Ligitan, because States, including the United States, tend to think that it is more blessed to receive than to give.

43. Now that is a truly extraordinary proposition. One can search the diplomatic exchanges between Britain and the United States in vain for any reference whatsoever to the fact that the United States had a claim to Sipadan and Ligitan that it was prepared to relinquish to Great Britain.

44. Apparently, Malaysia believes that the United States, by sheer inadvertence or disinterest, gave Sipadan and Ligitan and other islands to Great Britain. According to

Professor Crawford, no mention was made of a *quid pro quo* during the negotiations because this would have made the task of concluding the 1930 Convention more difficult (CR 2002/31, p. 52). Apart from the fact that my distinguished opponent once again failed to produce any evidence for this assertion, it is well to recall in this context the celebrated observation once made by the distinguished Brazilian jurist, Gilberto Amado, where he said: "*Les Etats ne sont pas des enfants.*"

45. States cannot be presumed to cede territory without compelling evidence to that effect. And that is particularly true where the State concerned, in this case, the United States, was under intense pressure, as I pointed out last week, both from the United States Senate and from the Philippine Government not to give up anything (CR 2002/29, p. 16). Malaysia bears a heavy burden to prove that the United States intended to cede territory. And it has not even begun to meet that burden.

46. No, Mr. President, there was no cession by the United States, and no *quid pro quo* in terms of a trade-off of islands. Islands south of Sibutu were not discussed in the negotiations leading up to the Convention or implicated by the Convention itself for the simple reason that they were not at issue. The United States had no claims in the area.

47. Professor Crawford placed heavy emphasis on the fact that the 1930 Convention was published, as were the maps. And he asked, once again: "Where were the Dutch?" (CR 2002/31, p. 53.)

48. Since this time counsel did not provide the answer, I shall do so. In fact, there are two answers. The first is that the 1930 Convention was in no way binding on the Netherlands. It was, as I had observed last week, *res inter alios acta* as far as the Dutch were concerned. That point seems to have been overlooked by our opponents. Yet, the Sole Arbitrator, Max Huber, made the point very forcefully in the *Island of Palmas* case. He stated: "It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers." (*Island of Palmas* case, II *UNRIAA*, p. 842.)

49. The second answer to counsel is equally compelling. It centres on the fact that Dutch interests simply were not affected by the 1930 Convention.

50. Recall if you would, Mr. President, Members of the Court, that four years before the 1930 Convention was concluded, the Netherlands was engaged in arbitral proceedings with the

United States in the *Island of Palmas* case. We have heard a great deal about that case over the past week, and rightly so because it concerns the same general area. During the course of those proceedings, the United States introduced evidence as to what it, the United States, considered the limits of Dutch possessions in the area to be.

51. [Place Indonesia Map Atlas, map 7, on the screen] One map relied upon extensively by the United States was an 1897 map — in other words, a map produced just six years after the 1891 Convention (Memorial of Indonesia, Map Atlas, map 7). That map is on the screen and is also in tab 11 of your folders. It is not, I might add, Professor Crawford's "jumbo jet" map, but another, larger scale map introduced by the United States in its pleadings against the Netherlands.

52. The United States went to great lengths to describe for Judge Huber the authoritative character of the map. Rather than have me explain what the map shows, let me quote from what the Government of the United States had to say about it. Recall, if you would, that this presentation was made in the course of State-to-State arbitral proceedings against the Netherlands. The United States described the map as follows:

> "The map reproduced indicates sovereignty both by color and by conventional boundaries in the sea. The Philippine Islands are colored green and are designated as 'Spanish'. The Netherlands East Indies are colored in light brown. British and Portuguese possessions are colored pink and dark brown, respectively."

53. [Enlarge relevant section of the map] Now if we enlarge the relevant area, the Court will see the boundary between Spanish and British possessions to the east of British North Borneo. The United States Memorandum filed in the *Island of Palmas* case observed that this boundary was evidently intended to separate the small Spanish islands south-west of Mindanao from the small British islands north-east of British North Borneo. Sibutu was identified and shown as constituting the south-westernmost limit of the Spanish possessions in the area.

54. The United States Memorandum in the case continued as follows:

> "Similarly, a black boundary south of Mindanao, made up of long and short dashes, is designated 'Boundary of Dutch Possessions'. It extends in an easterly direction from the boundary between the British and the Dutch portions of Borneo to a point some distance east of Mindanao."

55. The "Boundary of Dutch Possessions". That is how the United States described the line — the "conventional boundary" in the sea — extending east of Sebatik. Mr. President, that

dashed line east of Sebatik was portrayed in the same manner as the line on the land and on the continent of Borneo.

56. In its Counter-Memorial, Malaysia suggested that this map was unimpressive from the standpoint of "general repute" (Counter-Memorial of Malaysia, para. 5.9). But the map's importance lies not so much in the fact that it is an example of general repute, but rather in the fact that it depicted the limits of Dutch possessions in the region that were expressly endorsed and relied upon by the United States in judicial proceedings against the Netherlands.

57. By introducing this map against the Netherlands, the United States was setting forth its view as to the limits of Dutch and Spanish possessions in the area. In the case, the Netherlands argued that it held title to the Island of Palmas, which lay above this line further over towards Mindanao. But neither party — neither the United States nor the Netherlands — questioned the fact that everything south of the line on the map was Dutch.

58. Mr. President, Members of the Court, the *Island of Palmas* Award was rendered two years before the conclusion of the Anglo-United States Convention of 1930. With respect to the boundary position off North Borneo, the Netherlands was fully entitled to rely on the position set forth by the United States as to what the United States considered the limits of Dutch possessions to be. Indeed, in the area off Sebatik, the United States position coincided with the Dutch position as it had been depicted in the Explanatory Memorandum map.

59. The United States was on record as recognizing that the limit of those possessions was bounded by a line drawn east from the island of Sebatik — a line which would have included Sipadan and Ligitan as Dutch possessions. British possessions lay exclusively to the north of those lines, and Spanish possessions, which the United States inherited in 1900, were not viewed as extending to either island.

60. Now that being the case, why was the Netherlands expected to have any reaction to the 1930 Convention? The United States did not claim anything south of Sibutu. The 1930 Convention line lay to the north of the line depicting the limits of Dutch possessions that the United States had presented against the Netherlands during the *Island of Palmas* proceedings. Dutch interests simply were not affected by the Convention.

61. Professor Crawford also referred in his map presentation to the official chart that was issued illustrating the limits of the 1930 Convention line. [Place map as screen] Here is that chart to which counsel made reference. Counsel then asserted that the 1930 Convention line left the Ligitan Group to North Borneo (CR 2002/32, p. 25, para. 9, Mr. Crawford). But look, if you would, at the map. It does not even extend south of Darvel Bay and it certainly does not depict either Sipadan or Ligitan. And the Netherlands was supposed to react?

62. The fact that the Convention stipulated that "all islands to the south and west of the said line shall belong to the State of North Borneo" could only apply as between the parties to the Convention — Great Britain and the United States — and, in any case, could not be taken literally, the necessarily implied limitation being that the southerly and westerly islands only belonged to North Borneo if they did not already belong to someone else. The United States had no claims to the south and west of the 1930 line. But Great Britain was still bound by the provisions of the 1891 Convention with the Netherlands. That Convention dealt with the boundary separating British and Dutch possessions to the south of the areas covered by the 1930 Convention.

63. As of 1930, therefore, the matter had been settled. As between the United States and Great Britain, the United States had no claim to Sipadan or Ligitan. As between the Netherlands and Great Britain, Sipadan and Ligitan had been allocated to the Netherlands in 1891, while the other islands, such as Si Amil, etc., lying north of the 4° 10' N latitude had been allocated to Great Britain.

64. Mr. President, that concludes my presentation and I would be grateful, perhaps I think after lunch, if you would be good enough to call upon Ms Malintoppi to continue Indonesia's presentation.

Le PRESIDENT : Je vous remercie, Monsieur Bundy. La séance est levée. Nous reprendrons cet après-midi à 15 heures.

L'audience est levée à 13 heures.

CR 2002/34

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2002

Public sitting

held on Monday 10 June 2002, at 3 p.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan**
(Indonesia/Malaysia)

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le lundi 10 juin 2002, à 15 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan**
(Indonésie/Malaisie)

COMPTE RENDU

Present:	**President**	**Guillaume**
	Vice-President	**Shi**
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	**Weeramantry**
		Franck
	Registrar	**Couvreur**

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'anpel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmet Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. M[illegible]in Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et je donne immédiatement la parole, pour la République d'Indonésie, à M^e Loretta Malintoppi.

Mme MALINTOPPI :

Introduction

1. Monsieur le président, Madame et Messieurs de la Cour, je suis consciente du fait que — à ce stade de la procédure — un effort de synthèse s'impose. Je me bornerai donc à répondre aux thèses formulées par nos adversaires lors du premier tour de discussions orales quant à la portée de la cartographie dans la présente affaire, et cela, tout en évitant les répétitions inutiles.

2. La Cour se rappellera sans doute que le professeur Crawford dans son exposé de la semaine dernière a fait référence à une pièce de Shakespeare, *«Twelfth Night»*, en français : «La nuit des rois», pour classer la cartographie en trois rangs différents.

3. La citation telle que reformulée par le professeur Crawford pour l'adapter aux cartes pertinentes en l'espèce est la suivante, en français : «Les unes naissent dans la grandeur, les autres y parviennent, à d'autres encore elle s'impose d'elle-même» (traduction de Thédore Lascaris, ca. 1920; CR 2002/32, p. 22, par. 3). Ce qui est curieux, pourtant, dans l'exercice de style du professeur Crawford est que le passage de la pièce de Shakespeare fait référence aux gens qui grimpent l'échelle sociale et qui donc montent de niveau en importance et statut. Or, mon collègue de l'autre côté de la barre l'utilise à l'envers, pour donner une importance décroissante, jusqu'à nier toute importance, aux éléments de preuve cartographiques.

4. Avec tout le respect que je dois au professeur Crawford, je trouve ses catégories — quoique astucieuses — plus appropriées au contexte théâtral auquel elles appartiennent qu'à des argumentations juridiques. Le fait de vouloir entasser la cartographie dans un cadre si artificiel a pour conséquence que certaines cartes, et notamment celles qui sont à l'appui de la position indonésienne, sont bannies de l'univers shakespearien du professeur Crawford alors que d'autres sont promues au rang de cartes «nées dans la grandeur». Un admirable exercice, Monsieur le président, mais je vous rassure de tout de suite : je n'ai point besoin de faire un parallèle avec l'«Arlequin serviteur de deux maîtres» de Carlo Goldoni pour vous montrer qu'il existe dans ce dossier un grand nombre de cartes qui ne peuvent pas être ignorées au point de vue juridique.

5. Plus modestement, Madame et Messieurs de la Cour, je préfère revenir aux thèmes fondamentaux de la position indonésienne en matière de cartographie dans un contexte purement juridique.

Primo, dans la présente affaire, la cartographie constitue un élément de la pratique suivie par les parties dans l'application de la convention de 1891. Il en résulte que les cartes contextuelles et celles qui ont suivi immédiatement après la convention fournissent la preuve de l'existence d'un consensus entre les parties quant au sens et la portée de cette dernière.

Secundo, dans la très grande majorité des cartes postérieures à 1891 figure une ligne traversant l'île de Sebatik et continuant vers l'est le long du parallèle de latitude 4° 10' nord dans laquelle on reconnaît aisément le tracé résultant des termes de l'article IV de la convention. Celle-ci est la seule explication de la présence de cette ligne. La Malaisie, quant à elle, n'a sûrement pas offert d'autre explication.

Tertio, les cartes postérieures à l'indépendance de la Malaisie, établies de 1964 à 1974, montrent de façon concordante une ligne s'étendant au-delà de la côte orientale de Sebatik, qu'elle soit longue ou courte, et elles contredisent la position actuelle de la Malaisie et lui sont donc opposables en tant qu'*«admissions against interest»*. Ce n'est qu'en 1979, soit dix ans après la «cristallisation» du différend, que la cartographie malaisienne change et la Malaisie s'efforce, par ce revirement tardif, d'améliorer sa position en droit.

Quarto, il existe un dernier groupe de cartes, qui montrent une ligne s'arrêtant à la côte orientale de Sebatik, qui ne prouvent rien aux fins de la présente affaire. Ces cartes sont tout au plus neutres en matière de souveraineté car elles n'attribuent les îles litigieuses à aucune des Parties au litige.

1. Les cartes en tant qu'éléments de la pratique des parties à la convention de 1891

6. En ce qui concerne mon premier point, il suffira de rappeler que les cartes et les croquis échangés lors de la négociation de la convention témoignent d'une coïncidence remarquable entre les positions prises par les négociateurs de la convention et la position actuelle de l'Indonésie quant à la portée du règlement frontalier dérivant de la convention de 1891 (cf. dossiers de plaidoiries

indonésiens, premier tour de présentations, cotes n^{os} 24, 25, 26 et 27 et la plaidoirie du professeur Pellet, CR 2002/29, p. 50-56, par. 42-60).

7. Cet important matériau cartographique implique clairement la notion d'un partage territorial, et, encore plus clairement, marque la présence d'une ligne — répétée à partir de ce moment et jusqu'à 1974, dans toute une série de cartes officielles de provenances diverses — continuant au large de la côte orientale de l'île de Sebatik le long du parallèle 4° 10' nord de latitude.

8. Cette identité de vues entre les parties quant au tracé frontalier de 1891 est renforcée et confirmée par la carte annexée au «Mémorandum explicatif» néerlandais (dossiers de plaidoiries indonésiens, premier tour, cote n° 8) qui représente donc l'interprétation donnée à l'époque à la convention par les autorités néerlandaises et communiquée à leurs interlocuteurs britanniques, qui ne l'ont nullement contestée. La ligne figurant sur cette carte, ainsi que sur les cartes échangées pendant les négociations, est la preuve manifeste du fait que les parties acceptaient l'interprétation de l'Indonésie du tracé de la ligne préconisé par l'article IV de la convention de 1891.

9. Cette conclusion est également corroborée par les cartes émanant de la BNBC au temps de son administration de Bornéo du Nord, notamment celles publiées à partir de 1894, soit trois ans après la conclusion de la convention; ces cartes affichent la ligne résultant de ces conventions s'étendant vers le large à l'est des îles qui forment l'objet de ce différend (dossiers de plaidoiries indonésiens, premier tour, n^{os} 30 et 32, réplique indonésienne, vol. 2, carte 26).

10. Incidemment, les cartes Stanford de 1903 et 1904 (dossiers de plaidoiries indonésiens, premier tour, n° 30, réplique indonésienne, vol. 2, carte 26) ont été publiées postérieurement aussi à la conclusion des traités de 1898 et 1900 par lesquels l'Espagne avait cédé ses possessions dans l'archipel de Sulu aux Etats-Unis. Elles fournissent donc l'illustration graphique du fait que ces îles n'étaient pas à l'époque considérées comme faisant partie des possessions des Etats-Unis, du moins par la BNBC et donc par la Grande-Bretagne. A elles seules, ces cartes contredisent l'interprétation malaisienne du traité de 1900.

11. Que dit-on de l'autre côté de la barre à propos des cartes employées lors de la négociation de la convention ? Rien du tout. Pour nos contradicteurs, ces cartes ne méritent même pas d'être mentionnées, même en passant. Quant à la carte du «Mémorandum explicatif», elle est

classée sous la catégorie résiduelle du professeur Crawford, la numéro 3, où sont reléguées toutes les cartes qui n'ont pour lui aucune valeur, et notamment celles qui montrent des «lignes en mer» à l'est de Sebatik. De toute évidence, ces cartes ne conviennent pas à la Malaisie car elles sont à l'appui des thèses indonésiennes. Sir Arthur Watts a répondu aux argumentations de la Partie adverse à cet égard et je n'ai donc pas besoin d'y revenir.

12. Dans l'exposé du professeur Crawford, les cartes Stanford sont également vite «expédiées». Stanford n'était, après tout, que *«a commercial company»* (CR 2002/32, p. 37, par. 56) et les cartes qu'il publiait pour la BNBC ne montraient que des lignes administratives internes (CR 2002/32, *ibid.*).

13. Quant à la première de ces critiques, le professeur Soons a déjà expliqué exhaustivement pendant le premier tour des plaidoiries (CR 2002/28, p. 30-33, par. 8 et 9) quel était le statut indiscuté de Stanford en tant que cartographe officiel de la BNBC. Donc, je n'y reviendrai pas. Les preuves documentaires auxquelles le professeur Soons a fait référence appuient amplement la position indonésienne.

14. Pour ce qui est des allégations de la Partie adverse concernant les lignes figurant sur ces cartes, c'est une lapalissade que, même admettant, *quod non*, que les cartes Stanford ne montraient que les limites des districts administratifs de Bornéo du Nord, elles avaient évidemment tenu compte des frontières internationales. En effet, les limites des provinces de la BNBC figurant sur ces cartes, comme vous pouvez le voir, s'étendent en mer, et donc respectent la ligne de la convention de 1891, signée seulement quelques années auparavant. Les îles de Sipadan et Ligitan restent donc en dehors de la juridiction de la BNBC, alors que d'autres îles, situées à plus de 9 milles marins de la côte, mais au nord de la latitude de 4° 10' nord — telles que Si Amil, Dinawan et Mabul — y sont représentées comme relevant de la souveraineté britannique.

15. Les éléments de preuve apportés par les cartes que je viens de mentionner quant aux intentions des signataires de la convention de 1891 relativement au règlement qui découle de cette convention sont corroborés par le très grand nombre de cartes qui montrent une ligne traversant l'île de Sebatik et s'étendant plusieurs milles au large de la côte orientale de cette île.

2. La présence récurrente de la ligne de la convention de 1891 dans la cartographie postérieure à cette date confirme la position indonésienne

16. J'en viens ainsi à mon deuxième point. La caractéristique singulière de cette affaire, on l'a vu, est la présence dans de très nombreuses cartes officielles et tout particulièrement dans les cartes émanant de la direction nationale des cartes malaisienne ou de sa devancière, la Grande-Bretagne, d'une ligne dépassant l'île de Sebatik et continuant le long du parallèle de 4° 10' nord de latitude en direction de l'est.

17. Au début de sa plaidoirie concernant le prétendu titre malaisien sur les îles litigieuses, le professeur Crawford a affirmé catégoriquement : *«History shows that no one before 1969 ever considered them [the islands] to be part of the Netherlands or of Indonesia.»* (CR 2002/31, p. 41, par. 2.) Permettez-moi une opinion dissidente : en vérité, les cartes britanniques malaisiennes et même américaines, on l'a vu ce matin, antérieures à 1969 disent tout autre chose, et je me réfère notamment aux cartes échangées au cours des négociations, à la carte annexée au «Mémorandum explicatif» néerlandais, à la carte de l'atlas américain de 1897 que M. Bundy nous a montrée ce matin, aux cartes de Stanford et, en ordre chronologique, de 1944 à 1968, les cartes figurant dans les dossiers préparés par l'Indonésie au premier tour et qui sont reproduites sous les cotes nos 54, 57, 58, 59, 60, 62, 63, et 70.

18. Je voudrais ouvrir une parenthèse, Monsieur le président, si je peux. Vendredi dernier, le professeur Crawford s'est empressé de faire entrer dans sa troisième catégorie de cartes — celles qui, dans son analogie shakespearienne, n'ont aucun espoir de parvenir à la grandeur — certaines cartes présentées au cours de mon premier exposé, sous prétexte qu'elles ne représentent qu'un petit segment de ligne s'étendant au-delà de la côte orientale de l'île de Sebatik.

19. Contrairement à ce que prétend M. Crawford (CR, 2002/32, p. 37, par. 57), l'Indonésie n'a jamais cherché à rallonger les lignes figurant sur ces cartes. On n'a pas besoin de cela : je n'ai aucune difficulté à reconnaître que sur certaines cartes le tracé de la ligne est limité en longueur.

20. Toutefois, même si la longueur de la ligne est variable, le fait reste que ces cartes affichent une ligne qui passe à travers *(across)* l'île de Sebatik et continue vers le large en direction de l'est. Cette ligne ne s'arrête pas à la côte orientale de Sebatik, ce qui aurait été conforme à l'interprétation que la Malaisie prête à la convention. Toutes ces cartes — et même celles qui ne

montrent que l'amorce d'une ligne s'étendant à l'est de Sebatik — sont en contradiction ouverte avec la position formulée par la Malaisie en l'espèce.

21. En effet, si la ligne dépasse l'île de Sebatik en direction de l'est le long du parallèle de latitude de 4° 10' nord, quelle que soit sa longueur, elle conforte parfaitement les termes de l'article IV de la convention : *«The boundary shall be continued eastward along that parallel, across the island of Sebatik.»* Ce n'est sûrement pas par une simple coïncidence, Monsieur le président, que ces illustrations graphiques traduisent avec tant de précision les termes de l'article IV de la convention de 1891.

22. D'ailleurs, le professeur Crawford reconnaît ne pas avoir d'explication pour cette ligne, qu'elle soit courte ou longue, mis à part l'habituelle référence à la longueur de la mer territoriale. Et pourtant cette explication ne tient pas, tout d'abord parce qu'elle ne prend pas en compte les cartes dont la légende reconnaît en cette ligne une «frontière internationale» et, deuxièmement, puisque même mon éminent contradicteur admet que la longueur de la ligne est variable, elle ne peut donc pas représenter la mer territoriale.

23. Nos adversaires nous disent que les cartographes devaient avoir une raison de tracer une prolongation de la ligne en mer au-delà de Sebatik. Nous sommes tout à fait d'accord sur le principe. Et la raison d'être de cette ligne s'étendant vers la mer s'impose d'elle-même, la seule raison crédible est que le travail des cartographes ait été inspiré par l'exigence de reproduire la ligne établie par la convention de 1891.

3. Les cartes qui représentent des *«Admissions against interest»* par la Malaisie

24. J'en viens maintenant à mon troisième point, c'est-à-dire à l'importance des cartes qui représentent des *«admissions against interest»* pour la Malaisie. A cet égard, il convient de souligner qu'il est tout de même remarquable que le professeur Crawford dans sa plaidoirie de vendredi dernier, entièrement dédiée au matériau cartographique, ait passé prudemment sous silence la production des cartes de la Malaisie qui lui sont opposables puisqu'elles contredisent la position prise par cette dernière au cours de ce litige. A cette production massive s'ajoutent les cartes produites pour la Malaisie par son Etat prédécesseur, la Grande-Bretagne, à partir de 1964.

25. Pas un mot sur ces cartes par le professeur Crawford. Parfois, Monsieur le président, le silence parle plus fort que les mots. Il convient donc d'écouter cet étrange silence de la part de la Malaisie car il est révélateur de son embarras vis-à-vis de ces cartes.

26. Il y a — il faut le reconnaître — un petit paragraphe dans la longue plaidoirie du professeur Crawford qui fait référence à une carte malaisienne de 1966 (CR 2002/32, p. 37, par. 55). Toutefois, ce passage ne rend sûrement pas justice à un sujet aussi important que la très grande production cartographique officielle malaisienne qui va à l'encontre de la position actuelle de la Malaisie.

27. Certaines cartes britanniques et malaisiennes ont été placées par le professeur Crawford, comme par hasard, sous sa troisième catégorie et déclassées au rang de cartes sans importance ni conséquence. La purge de mon ami de l'autre côté de la barre n'épargne même pas la carte publiée par le ministère des mines de Malaisie illustrant les concessions pétrolières de 1968. Cette carte est *«generic»*, nous dit-on *and «it is obviously not intended to reflect the territorial position of particular islands which are not depicted»* (CR 2002/32, p. 34, par. 40).

28. Mais le professeur Crawford oublie que la carte se propose, comme la légende l'indique, d'illustrer les frontières internationales, sans — soit dit en passant — *«disclaimer»*.

29. Monsieur le président, Madame et Messieurs de la Cour, l'ensemble des cartes officielles malaisiennes est trop chargé de conséquences juridiques pour être «liquidé» comme ça, éliminé à la va vite avec toute sorte d'autres cartes jugées non pertinentes. Il est trop facile pour la Malaisie d'ignorer, d'une telle manière, nos argumentations à cet égard. Peut-être, nos collègues de l'autre côté de la barre reviendront là dessus après-demain. Entre temps, je me bornerai à rappeler que toutes ces cartes — dans la mesure où elles contredisent la position prise par la Malaisie au procès — constituent des éléments à charge pour la Partie malaisienne.

4. Les cartes neutres en matière de souveraineté

30. Et je passe à mon quatrième et dernier point. La Partie adverse nous accuse de vouloir — si vous me permettez cette expression un peu triviale, Monsieur le président — le beurre et l'argent du beurre. Le professeur Crawford affirme que, d'une part, j'aurais ignoré les cartes où la ligne s'arrête à l'île de Sebatik *«because they were boundary lines, which naturally stopped at the*

coast» (CR 2002/32, p. 37, par. 58) et, d'autre part, que j'aurais souligné l'importance des cartes qui étaient «*evidence of an allocation line proceeding to the east, and supported Indonesia's case*» (CR 2002/32, p. 37, par. 58).

31. Pour ce qui est des cartes où la ligne s'arrête à Sebatik, je l'ai dit au début de mon exposé, elles ne prouvent rien du tout, d'une façon ou de l'autre. Elles ne fournissent pas de preuve quant à la souveraineté de l'une ou de l'autre Partie sur les îles litigieuses. Il y a donc une remarquable différence qualitative dans la valeur probante de ces cartes par rapport à celles qui montrent la projection d'une ligne en mer. Le premier groupe est neutre en matière de souveraineté et n'a donc pas de valeur probante à cet égard, alors que le deuxième donne des indications claires quant à la souveraineté sur les îles en litige et montre que l'interprétation de la convention de 1891 dans la pratique correspondait à la position indonésienne.

32. Par ailleurs, si j'ai mis l'accent sur ce dernier groupe de cartes, c'est parce que je suis persuadée qu'un tracé frontalier indiscutable peut être dégagé de cet important matériau cartographique, pour paraphraser les termes de la Chambre de la Cour dans l'arrêt du *Différend frontalier* (*C.I.J. Recueil 1986*, p. 584, par. 58).

33. Nous avons inclus, sous la cote n° 12 des dossiers de plaidoiries que nous avons préparés pour ce deuxième tour, une liste de toutes les cartes — à partir des cartes rédigées pendant les négociations de la convention de 1891 jusqu'à une carte de 1978 — sur lesquelles apparaît une prolongation de la ligne à l'est de l'île de Sebatik s'étendant le long du parallèle de latitude 4° 10' nord. Cette énumération fournit la preuve du fait que l'interprétation indonésienne de la convention se fonde sur des éléments de preuve cartographiques plus que solides.

34. Avec votre permission, Monsieur le président, je souhaiterais montrer quelques exemples de cette cartographie à l'écran. Afin d'évitez de vous infliger une monotone liste de références je vous prie de trouver les références pertinentes à ces cartes dans nos textes écrits :

— la carte annexée au «Mémorandum explicatif» néerlandais de 1891 (sous la cote n° 8 des dossiers de plaidoiries indonésiens du premier tour);

— la carte Stanford de 1894 (sous la cote n° 32 des dossiers de plaidoiries indonésiens du premier tour);

— une carte provenant d'un atlas américain de 1897 soumise par les Etats-Unis avec leur mémoire dans l'arbitrage de l'*Ile de Palmas* (sous la cote n° 11 de vos dossiers de plaidoiries);

— la carte Stanford de 1903 (sous la cote n° 30 des dossiers de plaidoiries indonésiens du premier tour);

— la carte de Stanford de 1904 (réplique de l'Indonésie, vol. 2, carte 26);

— une carte de Bornéo tirée d'un atlas indonésien de 1953 (contre-mémoire de l'Indonésie, annexe 37);

— une carte de Tawau, produite par la Grande-Bretagne pour son Etat successeur, la Malaisie, cette fois ci en 1965 (sous la cote n° 58 des dossiers de plaidoiries indonésiens du premier tour);

— la carte politique de la Malaisie, de provenance malaisienne, la date en est 1966 (sous la cote n° 59 des dossiers de plaidoiries indonésiens du premier tour);

— la carte malaisienne représentant la Malaisie publiée en 1966 (sous la cote n° 62 des dossiers de plaidoiries indonésiens du premier tour);

— la même carte telle que publiée en 1967 toujours par la Malaisie (sous la cote n° 63 des dossiers de plaidoiries indonésiens du premier tour);

— une carte malaisienne de Semporna publiée en 1967 (elle se trouve sous la cote n° 13 de vos dossiers de plaidoiries). Cette carte reste significative, même si elle contient un *«disclaimer»* et si elle représente par erreur l'île de Ligitan au nord de la latitude 4° 10', alors qu'elle est située, et la Malaisie le reconnaît elle-même, au sud de cette ligne;

— la carte officielle malaisienne des concessions pétrolières de 1968 montrant la frontière internationale (sous la cote n° 60 des dossiers de plaidoiries indonésiens du premier tour);

— une autre carte de la Malaisie publiée par la direction nationale des cartes malaisienne en 1972 (sous la cote n° 64 des dossiers de plaidoiries indonésiens du premier tour);

— la carte, d'origine malaisienne, concernant le recensement de la population de Sabah de 1970, publiée en 1974 (sous la cote n° 65 des dossiers de plaidoiries indonésiens du premier tour);

— l'*Operational Navigation Chart*, de source britannique, publiée en 1978 (sous la cote n° 71 des dossiers de plaidoiries indonésiens du premier tour).

35. Dans toutes ces cartes, sans exception, la ligne continue au-delà de l'île de Sebatik et s'étend sur plusieurs milles marins à l'est de Sebatik, le long du parallèle de latitude de 4° 10'. Cette cartographie, qui couvre presqu'un siècle, à compter de la conclusion de la convention de 1891, est cohérente : elle affiche, pour reprendre l'expression qui se voulait ironique du professeur Crawford, des «lignes en mer». Il n'y a pas d'autre justification pour ces lignes — et la Malaisie n'en suggère aucune — que la nécessité d'illustrer ce qui avait été convenu en 1891.

36. Pensez-vous vraiment, Madame et Messieurs les juges, comme mon ami James Crawford, que ces cartes doivent être mises à la poubelle ? Ces «lignes en mer» méritent bien plus que le destin qu'il voudrait leur infliger. La valeur probatoire en est indiscutable : elles reproduisent de manière récurrente la ligne résultant de la convention anglo-néerlandaise de 1891 corroborant ainsi la position juridique de l'Indonésie que la souveraineté sur les îles de Sipadan et Ligitan lui appartient.

37. Ceci conclut ma plaidoirie. Je vous remercie très vivement Monsieur le président, Madame et Messieurs de la Cour, et je vous prie maintenant de bien vouloir donner la parole au professeur Alain Pellet.

Le PRESIDENT : Je vous remercie maître. Et je donne maintenant la parole au professeur Alain Pellet.

M. PELLET : Merci beaucoup.

LA CONDUITE DES PARTIES

Monsieur le président, Madame et Messieurs les juges,

1. Avec un solide bon sens, le professeur Crawford a énoncé jeudi dernier quelques vérités d'évidence que je n'ai pas de difficulté à reprendre entièrement à mon compte : «*When it comes to [territorial] title, some facts are better than no facts, and many facts are better than a few facts.*» (CR 2002/30, p. 47, par. 4.) Comment appliquer cette pensée profonde à notre espèce, Monsieur le président ? Assez simplement : ni l'une ni l'autre des deux Parties ne peut se targuer de beaucoup d'effectivités au sens plein du terme; mais l'Indonésie peut en invoquer quelques-unes (II) tandis que la Malaisie ne peut se prévaloir *d'aucun* — je dis bien *d'aucun* — acte de manifestation effective d'autorité souveraine sur l'une ou l'autre des deux îles (I). En revanche, la coïncidence

frappante de la conduite mutuelle des Parties confirme, de manière éclatante, l'interprétation indonésienne de l'article IV de la convention de 1891 (III). Commençons par :

I. Les ineffectivités malaisiennes

2. Sir Elihu Lauterpacht nous propose une définition des effectivités qui, à première vue, en vaut une autre : «Effectivités *consists of conduct attributable to a State which evidences its authority in, or in relation to, the disputed territory.*» (CR 2002/32, p. 14, par. 7.) Toutefois, à y regarder d'un peu plus près, cette définition est discutable en ce qu'elle «met dans le même sac», si je puis dire, les preuves de l'autorité d'un Etat *sur* un territoire [illegible] conduite *en relation avec* un territoire, ce qui est, assurément, infiniment plus vague. En outre, il manque ici un élément essentiel : «l'intention et la volonté d'agir en qualité de souverain», qui constitue l'essence même des effectivités (cf., arrêt du 5 avril 1933, *Statut juridique du Groënland oriental, C.P.J.I. série A/B n° 53*, p. 46; voir aussi : arrêts du 17 novembre 1953, *Minquiers et Écréhous, C.I.J. Recueil 1953*, p. 71; du 11 septembre 1992, *Différend frontalier, terrestre et maritime, C.I.J. Recueil 1992*, p. 566, par. 347 ou du 13 décembre 1999, *Ile de Kasikili/Sedudu, C.I.J. Recueil 1999*, p. 1105, par. 98, et l'avis consultatif du 16 octobre 1975, *Sahara occidental, C.I.J. Recueil 1975*, p. 43, par. 92 ou la sentence arbitrale du 9 octobre 1998 dans l'affaire *Erythrée/Yémen*, par. 315, p. 84-85 de la sentence).

3. En gardant ceci à l'esprit, suivons quelques instants mon éminent contradicteur dans son analyse de la liste des soi-disant effectivités malaisiennes, liste que nous avions incluse dans les dossiers de plaidoiries du 4 juin et dont il a eu l'amabilité de me remercier — pour votre commodité, Madame et Messieurs de la Cour, et pour celle de nos contradicteurs, nous l'avons à nouveau reproduite; elle porte, dans les dossiers d'aujourd'hui, le n° 14.

4. D'abord, sir Elihu la juge «quelque peu gonflée» (*«somewhat inflated»* — CR 2002/32, p. 15, par. 13). C'est assurément le cas — mais je n'y suis pour rien : cette liste se borne à énumérer très fidèlement tous les documents, à l'exception des cartes, invoqués dans les écritures de la Partie malaisienne à l'appui des effectivités dont elle se prévaut (cf. mémoire de la Malaisie, chap. 6 ; contre-mémoire de la Malaisie, chap. 4, réplique de la Malaisie, chap. 5). Au demeurant, ne maniant pas l'*understatement* avec le même bonheur que

mon très britannique ami, je ne dirais pas que cette liste — qui ne reflète donc que les vues de la Malaisie — est «quelque peu» gonflée; elle l'est démesurément !

5. Je dois, cependant rendre justice à sir Elihu : il m'a aidé à limiter — avec parcimonie il est vrai — cette inflation. Contredisant les écritures de la Malaisie, il élimine de son propre chef les documents figurant sous les n^{os} 1 à 13 (CR 2002/32, p. 15, par. 14). Dont acte — elles disparaissent (ce n'est pas moi, Monsieur le président, qui ai les talents de magicien que Jean-Pierre Cot me prête, mais Monsieur Rizzutti; il est assis derrière sa mystérieuse machine et a beaucoup aidé toute l'Equipe indonésienne pour toutes les questions cartographiques et les projections). Là s'arrête cependant l'esprit de coopération de sir Eli. Pour le reste, soit il ne dit rien — je m'en abstiendrai donc également et ces documents (qui correspondent aux n^{os} 16, 17, 25, 39 et 42) disparaissent aussi —, soit il s'emploie à tenter d'en établir la pertinence. A tort. Mais il faut tout de même dire quelques mots des trente-huit documents restants.

6. Je maintiens, Monsieur le président, que les documents n^{os} 14 et 15 (cf. sir Elihu Lauterpacht, CR 2002/32, p. 15-16, par. 14) ne sont pas pertinents aux fins qui nous occupent pour l'instant : M. Bundy a établi ce matin qu'ils ne montraient nullement que les Etats-Unis tenaient Ligitan et Sipadan ni pour américaines, ni pour britanniques, pas davantage qu'ils ne contredisaient la souveraineté néerlandaise sur les îles; mais, en tout cas, il ne peut être sérieusement soutenu que le voyage du *Quiros* conforte les effectivités des Etats-Unis ou de la Grande-Bretagne.

7. Tous les autres — tous les autres sans exception — entrent dans l'une ou l'autre des quatre catégories suivantes, parfois dans deux ou trois à la fois :

— ou bien ils sont sans rapport avec les îles qui n'y sont pas mentionnées;

— ou bien ils constituent de simples *paper claims* qui n'ont jamais trouvé application sur le terrain;

— ou bien ils sont le fait de personnes privées et, dans le meilleur des cas, ils établissent la compétence *personnelle* de la BNBC sur les Bajau de Dinawan mais, en aucune manière sa compétence *territoriale* sur les îles;

— ou bien enfin ils témoignent en effet d'une présence épisodique sur Ligitan et Sipadan mais avec l'accord de l'Indonésie.

a) ***Une présence épisodique acceptée par l'Indonésie***

8. Un seul élément relève de cette dernière catégorie : les lanternes lumineuses.

9. Sir Elihu en fait quelque cas. Il reconnaît que «*the construction of a lighthouse does not prove a wish to act* à titre de souverain» (CR 2002/32, p. 19, par. 26; pour la position indonésienne, voir CR 2002/29, p. 30-32, par. 37-41). Mais il estime qu'une telle construction doit être replacée dans un ensemble *(a pa*[illegible]*n)*, faisant sans doute allusion à l'entretien et à la maintenance des lanternes en question — soit dit en passant, on ne peut vraiment pas les considérer comme des phares dignes de ce nom. J'ai pour la Bretagne le même attachement que Jean-Pierre Cot pour la Savoie et je peux vous garantir, Monsieur le président, que cette construction de mécano — utile, au demeurant pour la navigation malaisienne locale — ne ressemble vraiment pas à nos phares bretons.

10. Ceci étant, le moins que l'on puisse dire est que, après leur construction, ces lanternes n'ont guère fait l'objet d'attentions de la part de la Malaisie devenue indépendante. En 1967, une patrouille, conduite par le sergent-major Ilyas, débarque à Sipadan dans le cadre d'une opération de police et constate — je cite les propres termes figurant dans l'affidavit de ce militaire : «*We only saw a lighthouse with faded paint, due to lack of maintenance.*» (n° 54 — mémoire de l'Indonésie, vol. 5, annexe D.) Et la vidéo qui nous a été projetée jeudi dernier montre que la Partie malaisienne s'est donné beaucoup de mal pour les rendre présentables aux fins du présent procès : on y voit des ouvriers occupés à repeindre une structure métallique rouillée qui, en effet, a grand besoin d'un bon coup de pinceau.

11. Mais l'essentiel n'est pas là. Il tient à ce que l'Indonésie a formellement donné son accord à l'entretien des deux lanternes. Il résulte en effet d'une note verbale indonésienne du 7 mai 1988 — la première de la longue série de notes protestant contre l'établissement d'équipements touristiques sur Sipadan — que l'accord de *statu quo* de 1969 avait prévu que les deux parties s'abstiendraient de toute activité sur l'île «sauf pour ce qui est de la maintenance d'un phare sur la partie orientale de Sipadan» (*except for maintaining a lighthouse at the easternmost part of Sipadan*, mémoire de l'Indonésie, vol. 4, annexe 142.

12. Selon sir Elihu, la pertinence de cette effectivité ne peut être écartée du fait de cette affirmation *ex post* relative à un accord quant à leur maintenance, vingt-six ans après l'apparition

du différend (*«by an* ex post facto *grant of «agreement» to their maintenance some 26 years later»*, CR 2002/32, p. 19, par. 26). Le fait est pourtant que la Malaisie, si soucieuse de contester toutes les affirmations indonésiennes, comme le montre la guerre des notes verbales de la fin des années 1980 et du début de la décennie suivante, n'a pas opposé le moindre démenti à ce rappel; elle n'aurait pas manqué de le faire si elle l'avait estimé inexact; en outre, on voit mal pourquoi l'Indonésie aurait proféré un mensonge sur ce point : dans le contexte de l'époque, il était de son intérêt de protester contre toute présence malaisienne sur l'île, même si, juridiquement, l'entretien des lanternes est sans portée particulière.

b) *Les documents établissant une compétence personnelle de la BNBC puis de la Grande-Bretagne sur les Bajau de Dinawan*

13. C'est le grand cheval de bataille de sir Elihu — mais je crois qu'il livre, avec panache, une bataille perdue.

14. Selon lui, les documents nos 18 et 19 *«show clearly that in 1910 the BNBC authorities . . . considered that the resolution of disputes over the collection of turtle eggs was a matter for their concern»* (CR 2002/32, p. 16, par. 15). La même remarque vaudrait également pour les nos 21 et 22 (*ibid.*). Mais, encore une fois, ceci ne prouve strictement rien en ce qui concerne la souveraineté territoriale sur l'île de Sipadan.

15. Sir Elihu affirme que ces documents et d'autres, postérieurs, qu'il ne cite pas, *«demonstrate the applicability and application of British legislation to Sipadan and the exercise of British legislation over the persons involved»* (*ibid.*, p. 17, par. 16). Mais, comme l'a dit avec force la Cour permanente dans l'affaire du Lotus :

> «Loin de défendre d'une manière générale aux Etats d'étendre leurs lois et leur juridiction à des personnes, des biens et des actes hors du territoire, [le droit international] leur laisse, à cet égard, une large liberté, qui n'est limitée que dans quelques cas par des règles prohibitives : pour les autres cas, chaque Etat reste libre d'adopter les principes qu'il juge les meilleurs et les plus convenables. C'est cette liberté que le droit international laisse aux Etats, qui explique la variété des règles qu'ils ont pu adopter sans opposition ou réclamations de la part des autres Etats.» (Arrêt du 7 septembre 1927, *C.P.J.I. série A n° 10*, p. 19.)

16. Il était naturel que la BNBC s'emploie à réglementer [illegible] vieil usage des Bajau de Dinawan consistant à récolter des œufs de tortue sur Sipadan. Il était naturel que les administrateurs britanniques s'efforcent de régler les chamailleries qui se sont élevées à ce sujet

entre les intéressés. Ce sont, assurément, des «activités gouvernementales classiques» (*classical governmental activities*, CR 2002/32, p. 17, par. 19, sir Elihu Lauterpacht); mais on ne voit pas quelles conséquences on peut tirer de ceci quant à l'appartenance territoriale de Sipadan, sur laquelle, je le rappelle, les Bajau de Dinawan n'étaient pas seuls à collecter les œufs de tortue, objets apparemment de bien des convoitises (cf. CR 2002/29, p. 26, par. 29.2).

17. En outre, cette collecte est, en elle-même, une activité privée qui n'entre pas dans le cadre de la définition des effectivités données par sir Elihu puisqu'elle n'est pas «attribuable à l'Etat» (CR 2002/32, p. 14, par. 7; voir *supra*, par. 2). Je note d'ailleurs que les avocats de la Malaisie se sont bien gardés de discuter la comparaison que j'avais faite mardi à cet égard avec la présence intermittente (mais bien moins épisodique) des Masubia sur l'île de Kasikili/Sedudu (CR 2002/29, p. 27, par. 29.2 et 29.3); je maintiens pourtant que la comparaison s'impose : il est évident que les membres de la tribu des Bajau qui collectaient des œufs de tortue sur Sipadan n'occupaient pas l'île «à titre de souverain», c'est-à-dire qu'ils n'y exerçaient pas «des attributs de la puissance publique» au nom des autorités britanniques ou malaisiennes (cf. l'arrêt du 13 décembre 1999, *C.I.J. Recueil 1999*, p. 1105, par. 98; voir aussi, arrêt du 22 décembre 1986, *Différend frontalier*, *C.I.J. Recueil 1986*, p. 617, par. 117 ou la sentence arbitrale du 9 octobre 1998 dans l'affaire *Erythrée/Yémen*, p. 84-85, par. 315 de la sentence).

c) *Les «paper claims» (ou «map claims») britanniques*

18. Le même raisonnement s'applique aux réglementations (et, *a fortiori*, aux simples statistiques) britanniques, dont mon contradicteur fait grand cas (cf. CR 2002/32, p. 17, par. 20, p. 18, par. 22 ou p. 18-19, par. 24) et qui sont principalement représentées par les documents figurant sous les n^{os} 24, 26 et 28, ainsi que par le document n° 27, qui se borne à annoncer le suivant.

19. Ici encore, rien au monde n'interdisait à la BNBC ou à l'administration britannique «d'étendre [ses] lois et [sa] juridiction à des personnes, des biens et des actes hors [de son] territoire» pour reprendre la formule du Lotus. Tous nos pays le font. La France n'accepte pas que ses nationaux rapportent dans leurs bagages des spécimens d'espèces rares ou protégées capturés dans la forêt amazonienne ou dans une réserve de Sierra Leone ou sur le haut plateau malgache

— et sans doute pas non plus des œufs de tortues de Sipadan (quand ses ressortissants n'y sont pas enlevés); il n'en résulte pas que ces parties du Brésil, de la Sierra Leone ou de Madagascar — ni même Sipadan — soient françaises ou revendiquées par la République.

20. Parlant de la *Turtle Ordinance* de 1917, sir Elihu semble admettre que les circonstances se prêtaient mal à des protestations immédiates; mais il ajoute : «*why they [they are the Netherlands administration] did not become aware of it in 1918, 1919, 1920 and each subsequent year of its existence and* application» ? (CR 2002/32, p. 17, par. 20; les italiques sont de moi.) Outre que je doute, décidément, que la lecture (surtout rétrospective) des publications de la Compagnie fût l'occupation favorite des administrateurs coloniaux néerlandais (qui n'étaient guère nombreux), ils n'avaient aucune raison de protester contre une «application» qui, visiblement, n'a jamais existé, sauf dans l'imagination de nos contradicteurs. Il est frappant de constater que la Malaisie n'a pu faire état d'aucun épisode témoignant de la mise en œuvre effective *sur* Sipadan ou Ligitan de la *Turtle Ordinance* ou de la notification de 1933 relative aux échassiers. A aucun moment, un policier, un inspecteur des forêts ou des ressources naturelles ou un simple administrateur britannique n'y a posé le pied — car l'on peut faire confiance à la Partie malaisienne : si tel avait été le cas, cela se saurait ! J'ajoute que le texte même de l'ordonnance dément l'interprétation qu'en donne la Malaisie : Sipadan y est incluse dans la «*Schedule* C» ce qui en fait une «réserve indigène» *(native reserve)* sur laquelle aucune licence ne pouvait être octroyée; les Britanniques reconnaissent ainsi le caractère traditionnel, ethnique, familial, de la collecte des œufs de tortues sur l'île et, loin d'y affirmer leurs droits souverains, manifestent leur intention de *ne pas* les exercer «en relation avec» Sipadan, pour reprendre l'expression de sir Elihu.

21. Au demeurant, quand bien même ces documents témoigneraient d'une revendication territoriale de la part de la Grande-Bretagne *(quod non)*, il ne s'agirait que de *paper claims*, non suivis du moindre début de commencement d'exécution sur le terrain. Ils peuvent donc disparaître eux aussi.

22. Dans le même esprit, sir Elihu me fait grief de n'avoir pas mentionné, dans la liste des effectivités revendiquées par la Malaisie, le croquis n° 18 de l'atlas indonésien qui prétend représenter les limites du district de police de Lahad Datu. Jetons-y un coup d'œil; ce croquis figure sous l'onglet 16 dans le dossier de plaidoiries.

23. Certes, la limite du district englobe Sipadan et Ligitan. Mais :

— il faut reconnaître que la ligne sinueuse qui est supposée marquer la limite du district est surprenante s'agissant d'une limite maritime et témoigne de l'amateurisme de l'auteur du croquis;

— il en va de même de l'emplacement de Ligitan, nettement au nord du parallèle 4° 10' alors qu'elle se trouve en fait, légèrement mais nettement, au sud de celui-ci, comme sir Arthur Watts l'a montré ce matin;

— la limite prêtée au district par M. Ross, l'auteur de ce croquis, contraste avec celle de la circonscription de Semporna sur le croquis de celle-ci qui date de 1935, dont vous pouvez voir l'extrait pertinent à l'écran et qui figure aussi sous le n° 17 dans les dossiers;

— et l'on retrouve ce même tracé sur la carte de Sabah qui est projetée maintenant; elle a été établie en 1964 par le *Department of Lands and Surveys* de Sabah et réimprimée, en 1972, par la direction cartographique nationale de Malaisie; elle porte le n° 18 dans les dossiers.

Je ne pense pas, Monsieur le président, que l'on puisse tirer grand-chose de la *«map claim»* sur laquelle s'appuyait sir Elihu la semaine dernière.

d) *Les documents ne mentionnant ni Ligitan, ni Sipadan*

24. Restent enfin, si l'on revient à notre liste des effectivités réinvoquée par la Malaisie, deux documents, deux seulement, mentionnés par sir Elihu (CR 2002/32, p. 16, par. 15, p. 20, par. 29) mais qui ont pour point commun de ne faire nullement état de l'une ou de l'autre de nos deux îles. Ils portent les n^{os} 20 et 40 dans la liste. Malgré tout le désir que j'ai d'être agréable à mon éminent ami, je vois mal comment ils pourraient être maintenus parmi les preuves d'effectivités malaisiennes : non seulement ce sont aussi des *«paper claims»* des «revendications de papier», mais encore ils ne revendiquent rien du tout (pour un exemple comparable, concernant une réserve animalière, voir, arrêt du 13 décembre 1999, *Ile de Kasikili/Sedudu, C.I.J. Recueil 1999*, p. 1095-1096, par. 76 et 78). Nous voici donc, Madame et Messieurs les juges, devant un écran blanc : *il n'y a pas eu d'effectivité malaisienne avant 1969; il n'y a pas eu d'effectivité britannique durant la période coloniale; pas davantage que la Malaisie n'a pu faire état de la moindre présence effective de Sulu sur l'une ou l'autre des deux îles avant 1891.* Pas

d'effectivité, donc, qui puisse venir à l'appui d'un titre (d'ailleurs imaginaire) ; pas d'effectivité qui puisse fonder un titre quelconque ; *a fortiori*, pas d'effectivité susceptible de déplacer le titre indonésien. Ceci contraste avec les arguments que peut faire valoir l'Indonésie et, assurément, Monsieur le président, comme l'a dit le professeur Crawford (voir *supra*, par. 1) :

II. «Quelques effectivités valent mieux qu'aucune»

25. Ce sera le deuxième temps de mon argumentation.

26. Sir Elihu vous a mis en garde, Madame et Messieurs les juges : *«the fact that the question of the nature and effect of the conduct of the Parties is thus being divided between counsel should not be allowed to suggest that there is any real comparability between the effectivités of the two sides»* (CR 2002/32, p. 12, par. 1).

Il n'empêche que la dissociation opérée du côté malaisien présente la conséquence fâcheuse d'occulter, justement, cet élément comparatif. Mon collègue Alfred Soons a traité ce matin, de manière détaillée, des effectivités néerlandaises avant l'indépendance de l'Indonésie; nous avons cependant pensé qu'il pouvait être éclairant de mettre ces effectivités en parallèle avec les effectivités — ou les non-effectivités — invoquées par la Malaisie. Mais revenons d'abord sur les effectivités de l'Indonésie (ou de son prédécesseur, les Pays-Bas). Elles sont peu nombreuses, mais bien réelles.

27. «Le *Lynx*, le *Lynx* et encore le *Lynx* !» (cf. CR 2002/32, p. 21, par. 32, sir Elihu Lauterpacht), Monsieur le président, c'est toujours mieux que *«rien, rien* et encore *rien* !»... S'il n'y avait que *le Lynx*, ce serait déjà quelque chose — et plus que ce dont peut faire état la Malaisie. Si les officiers et l'équipage du *Lynx* n'ont peut-être pas effectué sur Sipadan un séjour aussi long que les amateurs de plongée sous-marine qui s'y rendent maintenant par milliers, ils en ont au moins foulé le sol et l'ont survolée, ainsi que Ligitan, dans le cadre d'une opération de police. De son côté, la Malaisie n'a pu mentionner la présence sur l'île d'aucun officiel britannique ou malaisien avant 1969, pas davantage qu'elle n'a pu trouver la moindre trace d'un navire britannique ou malaisien croisant dans les parages immédiats des deux îles, ceci, à nouveau, jusqu'à ce que, à partir de la fin des années 1980, la Malaisie y envoie des flotilles.

28. Au demeurant, quoi que la Partie malaisienne s'emploie à faire croire, il n'y a pas que le *Lynx*, loin de là. Oh certes, notre liste d'effectivités est moins longue que celle que la Malaisie veut vous faire prendre pour telle, moins gonflée artificiellement, moins «*inflated*». Mais au moins, ce sont de véritables manifestations de la volonté d'agir sur les îles contestées (ou dans leurs parages immédiats) en qualité de souverain. Ces effectivités sont énumérées dans le document n° 15 des dossiers de plaidoiries.

29. Il y a le *Lynx*, assurément.

Mais, avant, nous savons au moins

— qu'en 1903, le *Macasser* avait procédé à des relevés hydrographiques à Ligitan et Sipadan;

— qu'en 1910, le *Koetei* avait croisé à deux reprises tout près de Sipadan;

— et que ces deux patrouilles font suite à celle effectuée en 1876 par l'*Admiraal van Kinsbergen* dans les parages immédiats de Sipadan (et à Mabul — mais cette île est devenue possession britannique du fait de la convention de 1891)

Après 1921 et jusqu'à l'indépendance de l'Indonésie en 1949, il est vrai que nous avons un problème d'archives, que le professeur Soons a expliqué. Et, étant donné les circonstances, on ne pouvait attendre des autorités du nouvel Etat, l'Indonésie indépendante, qu'elles accordent une attention prioritaire à ces deux îles excentrées et inhabitées d'un archipel qui en compte quelques dix-sept mille.

30. Mais, à partir du début des années 1960, avant la date critique, l'Indonésie peut faire état d'un nombre non négligeable de patrouilles de police. Je les ai énumérées mardi dernier (CR 2002/29, p. 56-57, par. 21) et ne reviens, à titre d'exemple, que sur le document n° 6 dans la liste. Il montre que, à la suite de plaintes de pêcheurs de l'île, indiscutablement indonésienne, de Nanoekhan, contre la pêche illégale de ... Malaisiens de Semporna, la marine indonésienne a effectué une descente *sur* Sipadan (c'est à cette occasion que les militaires indonésiens ont constaté que la lanterne était rouillée).

31. La Partie malaisienne n'a pas pris la peine de discuter ces effectivités. Et pourtant ... De telles «visites périodiques» sont, sans aucun doute, de belles et bonnes preuves d'effectivités (cf. arrêt du 17 novembre 1953, *Minquiers et Écréhous*, *C.I.J. Recueil 1953*, p. 66). Comme on l'a écrit, des activités qui «se rapportent à l'exercice régulier des fonctions de contrôle du territoire»

peuvent «constituer une preuve pertinente de la manifestation du pouvoir étatique» (Marcelo Kohen, *Possession contestée et souveraineté territoriale*, PUF, Paris, 1997, p. 216). Du reste, la Malaisie n'hésite pas à se prévaloir d'effectivités comparables (cf. mémoire de la Malaisie, p. 61-64, par. 6.5 et 6.6 et réplique de la Malaisie, p. 69, par. 5.9); malheureusement pour elle, il s'agit toujours et seulement d'épisodes se situant sur des îles ou dans des eaux environnantes, relevant sans aucun doute de la souveraineté malaisienne et n'ayant aucun rapport ni avec Ligitan, ni avec Sipadan.

32. A cet égard, la Partie malaisienne se livre à un double tour de passe-passe :

— en premier lieu, faute de mention de Ligitan dans la quasi-totalité des documents invoqués par la Malaisie à l'appui de ses (in)effectivités, sir Elihu procède par d'aventureuses affirmations : *«if Sipadan was British, so was Ligitan»* (CR 2002/32, p. 17, par. 17); *why Sir Eli? «If Sipadan was British and not Dutch, it follows that Ligitan was British and not Dutch.» (Ibid.) Again, why?* Il s'agit de deux îles, distinctes, qui ne présentent pas du tout les mêmes caractères géophysiques et les effectivités sur l'une ne sauraient, mécaniquement, contaminer le statut juridique et territorial de l'autre (même si je dois admettre que les effectivités dont l'Indonésie peut se prévaloir sont plus fermement établies sur Sipadan que sur Ligitan);

— en second lieu — et ceci est supposé être l'explication de cela —, Sipadan et Ligitan feraient partie du même groupe d'îles, de la même unité économique et sociale *(ibid.)*. Sir Arthur Watts a montré ce matin qu'il n'en était rien et je ne pense pas qu'il soit utile d'y revenir.

33. La Malaisie ne peut, dans notre affaire, se prévaloir des opérations de police menées contre les Bajau d'Omadal (nos 6 et 10 des documents de la liste), de Dinawan (nos 9, 11 et 39), de Si Amil (nos 11 et 39) ou, à fortiori, de Sibutu (n° 39). Ces effectivités là — car ce sont de véritables effectivités — concernent seulement ces quatre îles du soi-disant *«Ligitan Group»*; aucune n'est relative à Ligitan ou Sipadan, et je soupçonne que nos contradicteurs ont concocté la notion *«Ligitan Group»* uniquement pour opérer cette translation. Malgré la très grande sympathie que j'ai pour la magie malicieuse d'Harry Potter (puisqu'il apparaît que le Magicien d'Oz n'a plus la cote), elle est inopérante dans ce grand hall de justice — et nous voici ramenés à notre page blanche.

34. Quelques effectivités valent mieux qu'aucune. L'Indonésie en présente quelques-unes — huit comme le montre la liste reproduite sous l'onglet n° 15 de vos dossiers et projetée derrière moi (car le recensement des navires, portant le n° 2 dans cette liste, ne présente pas un caractère autonome). La liste est relativement modeste; mais elle a le mérite d'exister par contraste avec la page blanche à laquelle se réduit celle, en trompe l'œil, des effectivités revendiquées par la Malaisie (cf. le document n° 14 du dossier de plaidoiries). D'ailleurs, quand bien même l'Indonésie n'aurait pu faire état d'aucune effectivité, son titre n'en serait pas moins établi sur la base du traité de 1891; les effectivités dont elle peut se prévaloir confirment ce titre conventionnel (voire celui hérité de Boeloengan).

35. Dans l'affaire de *l'Ile de Clipperton*, le roi d'Italie a constaté que, malgré la relative pauvreté des effectivités dont elle pouvait se prévaloir, la France n'avait pas perdu le titre lui appartenant, «puisqu'elle n'a jamais eu l'*animus* d'abandonner l'île, et le fait de n'y avoir pas exercé son autorité d'une manière positive n'implique pas la déchéance d'une acquisition définitivement achevée» (*RSANU* II, p. 1110-1111); la jurisprudence est constante en ce sens (cf. arrêt du 5 avril 1933, *Statut juridique du Groënland oriental*, C.P.J.I. *série A/B n° 53*, p. 47; arrêt du 11 septembre 1992, *Différend frontalier terrestre, insulaire et maritime*, *C.I.J. Recueil 1992*, p. 563-564, par. 342-343; voir aussi Charles de Visscher, *Les effectivités en droit international public*, Pedone, Paris, 1967, p. 115). Mais, ici, non seulement l'Indonésie n'a nullement abandonné son titre, mais encore elle l'a exercé, comme le montrent les effectivités que j'ai décrites. Et il y a davantage : la coïncidence des comportements des Parties avant, et même après, la date critique, établit leur accord pour considérer le parallèle 4° 10' de latitude nord comme la limite de leurs juridictions respectives. Ceci me conduit au troisième et dernier temps de ma démonstration.

III. La coïncidence du comportement des Parties

36. Le moins que l'on puisse dire, Monsieur le président, est que, sur ce point (comme sur pas mal d'autres, il est vrai), les avocats de la Malaisie, n'affrontent pas la difficulté. De même qu'ils se sont abstenus de débattre des patrouilles de police indonésiennes, de même, ils observent un mutisme prudent sur les aides à la navigation de part et d'autre du parallèle 4° 10' nord (*b)*) et

ils n'abordent que du bout des lèvres la question du tracé des lignes de base (*a*)) et celle, pourtant cruciale, des concessions pétrolières (*c*)).

a) *Le tracé des lignes de base*

37. Le tracé des lignes de base par les deux Parties témoigne, à vrai dire, d'un accord en quelque sorte «négatif» : il n'est intéressant que parce que l'une *et* l'autre des Parties se sont abstenues de prendre Ligitan et Sipadan en considération. Soucieux de me conformer pleinement aux recommandations que vous nous avez adressées vendredi dernier (CR 2002/32, p. 41-42), Monsieur le président, je ne répéterai pas ce que j'ai dit la semaine passée et me bornerai à y renvoyer respectueusement la Cour dans toute la mesure où le professeur Crawford n'a pas jugé bon de s'y arrêter (voir CR 2002/29, p. 53-56, par. 11-18).

38. Et il s'y est fort peu arrêté : l'une des rares remarques qu'il a faites a consisté à projeter un autre segment des lignes de base indonésiennes (que vous pouvez voir à l'écran et qui figure sous le n° 19 dans les dossiers de plaidoiries) et à affirmer : «*You can see there is no indication of restraint here ... In short, we may presume that the reason Indonesia did not draw its baseline over to Ligitan was not restraint, but that it did not claim the two islands in 1960*» (CR 2002/32, p. 28, par. 20). L'amalgame ne saurait convaincre : le secteur en question est celui des îles Mapia, un petit archipel au large de l'Irian Jaya qui a compté jusqu'à trois cents habitants permanents. En outre et surtout, ce décrochement ne risquait d'empiéter sur les prétentions d'aucun autre Etat.

39. Il en serait allé fort différemment si l'Indonésie avait pris en compte Ligitan et Sipadan dans le tracé de ses lignes de base archipélagiques. Non seulement, comme le montre le croquis projeté en ce moment (qui porte le n° 20 dans les dossiers de plaidoiries), il en serait résulté une surface supplémentaire de plus de 4200 km^2 incluse dans ses eaux archipélagiques — ceci n'aurait sans doute pas été du goût du Royaume-Uni puis de la Malaisie : le droit de passage archipélagique est soumis à des restrictions qui auraient pu gêner la navigation malaisienne de cabotage, intense dans cette zone. Mais encore, l'Indonésie aurait été en droit de réclamer, au-delà de ses eaux archipélagiques, une mer territoriale et un plateau continental, ce qui n'aurait pas manqué de poser des problèmes de délimitation inextricables.

40. On voit d'ailleurs les risques auxquels un tel comportement unilatéral aboutit en jetant un coup d'œil à l'extrait de la carte malaisienne de 1979 projeté derrière moi (n° 21 des dossiers de plaidoiries) : la ligne rouge représente les limites de la mer territoriale et du plateau continental revendiqués par la Malaisie et se passe de commentaires tant l'empiétement qui en résulte sur les droits de l'Indonésie est manifeste.

41. Ceci ne doit pas faire oublier que cette carte n'avait été publiée qu'en 1979, dix ans après la date critique. Sept ans auparavant, en 1972, la Malaisie avait publié une carte officielle qui ne prenait nullement en compte Ligitan et Sipadan et que je projette à nouveau (elle figure dans les dossiers de plaidoiries à l'onglet n° 22). Elle montre que trois ans après la première manifestation de ses revendications sur Ligitan et Sipadan, la Malaisie ne se comportait toujours pas comme si les îles étaient siennes, et elle témoigne de l'accord des parties selon lequel le parallèle 4° 10' nord était bien la limite de leurs possessions respectives.

b) *Les aides à la navigation*

42. C'est aussi le cas des balises électriques disposées — et entretenues — par chacune des Parties, publiquement, de part et d'autre de cette même ligne. Je cite intégralement *tout* ce que M. Crawford a trouvé à en dire :

> *«Indonesia is inconsistent in its treatment of navigational lights. The erection after the critical date of lights on reefs far to the west (Alert Patches and Roach Reef) is treated as significant. On the other hand, Malaysia's [Great Britain's] erection of lighthouses on the islands themselves before the critical date is treated as irrelevant»* (CR 2002/32, p. 40, par. 62.5).

J'ai parlé des lanternes assez longuement et n'y reviens pas. En tout cas, il n'y a pas la moindre incohérence ici : ce qui importe, ce n'est pas l'établissement et la maintenance des balises par l'Indonésie d'une part et la Malaisie d'autre part en tant que tels, c'est la *coïncidence* de leurs comportements mutuels, qui marque leur accord pour considérer que la ligne de la convention de 1891 constitue la limite de leurs juridictions respectives (voir CR 2002/29, p. 57-59, par. 25-28).

c) *Les concessions pétrolières*

43. C'est encore plus frappant en ce qui concerne les concessions pétrolières. Le professeur Crawford en a brièvement traité vendredi dernier (CR 2002/32, p. 33-34, par. 39-43). Pour dire

deux choses seulement : qu'il n'y a pas eu de pratique pétrolière concernant les deux îles (par. 41); puis que, s'il y en a eu une, elle est, bien sûr, malaisienne puisque, dit-il, la concession Teiseki (de 1968) traverse la mer territoriale de Ligitan (par. 42). Et de conclure : «*Of the two concessions, it is Malaysia's and not Indonesia's which implies a territorial claim to at least one of the islands in dispute.*» (*Ibid.*)

44. Mon contradicteur néglige un élément fondamental : comme les aides à la navigation, les concessions des années soixante (la concession Japex/Permina date de 1966) montrent qu'à la veille de la date critique, les deux Etats considéraient le parallèle 4° 10' nord comme la limite de leurs juridictions respectives. En 1891, ce n'était évidemment qu'une ligne d'allocation de territoires entre les possessions coloniales respectives des Néerlandais et des Britanniques — comme mes collègues et amis Alfred Soons et sir Arthur Watts l'ont montré ce matin. Evidemment, ce n'était pas alors une frontière maritime : à cette époque il n'y avait rien à délimiter si ce n'est la mer territoriale et les parties ne s'en sont pas souciées, comme le montrent les perplexités néerlandaises dans les années 1920.

45. Mais, durant les années soixante (puis quatre-vingt-dix lorsque les balises ont été établies), le problème se posait en des termes tout à fait différents : les parties pouvaient prétendre non seulement à une mer territoriale, mais aussi à un plateau continental. Elles ont considéré que la ligne constituée par le parallèle 4° 10' constituait la limite des zones maritimes auxquelles elles pouvaient prétendre. D'où les concessions. D'où les aides à la navigation. D'où aussi les limites spontanément respectées jusqu'en 1969 du rayon d'action des patrouilles navales effectuées par les deux pays (cf. CR 2002/29, p. 56-57, par. 20-24). D'où, sans doute aussi, la non-prise en considération des deux îles lors du tracé des lignes de base par l'un et l'autre Etat : le contraire eût impliqué des chevauchements considérables de leurs prétentions maritimes respectives. Dès lors, la concession Teiseki ne doit pas être lue comme incluant la mer territoriale supposée de Ligitan, mais comme témoignant de la conviction de la Malaisie selon laquelle le parallèle 4° 10' nord constitue la limite de sa juridiction. Exactement comme la concession Japex dénote la même conviction de la part de l'Indonésie.

46. Le compromis par lequel les deux Parties vous ont saisis ne vous demande pas, Madame et Messieurs les juges, de procéder à la délimitation maritime entre les deux pays. Mais il n'en

résulte pas que vous ne puissiez prendre les concessions en considération, exactement comme le tribunal arbitral qui a tranché le différend entre l'Erythrée et le Yémen a tenu compte de l'existence de concessions pétrolières pour décider de l'attribution des îles en litige (sentence du 9 octobre 1998, p. 101-115, par. 389-439 de la sentence), alors même qu'il a fixé le tracé de la limite maritime entre les deux Etats par une sentence distincte, dans laquelle il s'est d'ailleurs référé à la pratique pétrolière avec plus de réticence (cf. sentence du 17 décembre 1999, p. 25, par. 83).

47. Ligitan et Sipadan se trouvent au sud de ce que les deux parties considéraient à la veille de la naissance du différend comme la limite de leurs juridictions respectives comme le montre une série de comportements concordants des parties venant confirmer les effectivités de l'Indonésie, qui contrastent avec l'absence totale d'effectivités malaisiennes. Ligitan et Sipadan relèvent donc de l'Indonésie.

RÉCAPITULATION JURIDIQUE

Monsieur le président, Madame et Messieurs les juges,

1. L'agent de l'Indonésie va, dans quelques instants, lire les conclusions finales de la Partie indonésienne et faire quelques très brèves remarques de nature plus générale. Pour ma part, je me bornerai à récapituler brièvement l'essentiel de notre argumentation juridique.

2. Même si nos collègues et amis de l'autre côté de la barre se sont donnés beaucoup de mal pour tenter de dissiper l'impression que laisse inévitablement la lecture des écritures malaisiennes, cette impression demeure à ce stade des plaidoiries orales : la thèse de la Malaisie est artificielle, contradictoire, laborieuse, compliquée. Mais cette affaire n'est pas compliquée :

— constatant l'incertitude des limites des possessions respectives de la BNBC et des Pays-Bas, ces derniers ont conclu avec la Grande-Bretagne un accord fixant ces limites de manière complète et définitive;

— dans la zone qui nous intéresse, la limite est fixée au parallèle 4° 10' de latitude nord;

— Pulau Ligitan se trouve juste au sud de cette limite; Pulau Sipadan est située à 6 kilomètres plus au sud;

— l'une et l'autre relèvent, par conséquent, de la souveraineté de l'Indonésie, successeur des Pays-Bas.

3. C'est aussi simple que cela, Monsieur le président ! Et cela pose d'autant moins de problèmes que le sultan de Sulu n'a jamais été présent au sud de ce parallèle et que dans les très rares cas où les Britanniques s'y sont aventurés, après 1878, ils en ont été empêchés par les Hollandais. En revanche, il est établi et que le Sultanat de Boeloengan exerçait son autorité au nord de Batoe Tinagat, et que les Néerlandais étaient bien présents dans la région tant sur terre que dans les eaux environnantes. Et pour lever toute ambiguïté je tiens à préciser que l'Indonésie maintient, à titre subsidiaire, que si, par impossible, la Cour devait écarter le titre qu'elle tient de la convention de 1891, elle n'en serait pas moins le successeur de Boeloengan et, à ce titre, sa souveraineté sur les îles serait également établie.

4. Ceci étant, après 1891, la ligne de la convention a parfaitement rempli son office : elle a assuré la stabilité territoriale sur Bornéo et dans les îles environnantes; son tracé a pu être précisé lorsqu'il s'est révélé incertain (il en est résulté les accords de 1915 et 1928) et, en mer, les parties et leurs successeurs se sont fondés sur le parallèle 4° 10' dans leur conduite mutuelle comme en témoignent la cartographie assez impressionnante que vous a montrée tout à l'heure Madame Malintoppi et la présence des Néerlandais puis des Indonésiens sur Sipadan et dans les eaux baignant les deux îles ainsi que l'absence corrélative des Britanniques puis des Malaisiens; comme en témoigne aussi la conduite mutuelle des parties à la veille de la naissance du différend et même au-delà.

5. Car ce n'est pas en 1969, date à laquelle quelques techniciens de Kuala Lumpur ont «découvert» que la Malaisie aurait un titre sur Ligitan et Sipadan, que la situation a commencé à changer, mais à la fin des années 1980, lorsque la Malaisie a entrepris d'organiser l'exploitation touristique intensive de Sipadan.

6. Je ne reviens pas, à cet égard, sur l'accord de *statu quo*, Monsieur le président — sauf à dire tout de même deux choses :

— d'une part il résulte clairement de l'affidavit du professeur Mochtar Kusumaatmadja (mémoire de l'Indonésie, vol. 5, annexe A) qu'il s'agit d'un «*understanding*», distinct de l'échange de notes du 22 septembre 1969 avec lequel la partie malaisienne le confond (cf. CR 2002/30, p. 1[illegible] par. 16-18, agent);

— d'autre part, accord de *statu quo* ou non, comme l'a rappelé avec force la Cour permanente,

> «[l]es parties en cause doivent s'abstenir de toute mesure susceptible d'avoir une répercussion préjudiciable à l'exécution de la décision à intervenir, et, en général, ne laisser procéder à aucun acte, de quelque nature qu'il soit, susceptible d'aggraver et d'étendre le différend» (1939, *Compagnie d'électricité de Sofia et de Bulgarie, mesures conservatoires, C.P.J.I. série A/B n° 79*, p. 199).

7. Au vu de ce principe qui vaut d'une manière générale et qui est un corollaire de l'obligation incombant aux Etats de régler pacifiquement leurs différends, non seulement la Malaisie aurait dû s'abstenir de promouvoir l'invasion touristique de Sipadan, mais, en outre, il est particulièrement choquant qu'elle en tire argument pour prétendre que l'Indonésie chercherait à vous conduire à «expulser» *(to oust)* la Malaisie d'une île sur laquelle elle aurait été établie de longue date comme l'a fait à deux reprises sir Elihu Lauterpacht jeudi dernier (CR 2002/30, p. 30, par. 12 et p. 36, par. 23). La partie malaisienne n'a jamais pu faire état de la moindre activité sur l'île avant 1988, date à laquelle elle a voulu créer un fait accompli dont elle tente de tirer partie pour faire de l'Indonésie un Etat requérant. Et, comme vous l'avez rappelé vous-même au début de ces audiences, Monsieur le président, le fait que nous ayions accepté de plaider en premier «n'implique pas que l'Indonésie puisse être considérée comme Etat demandeur ou la Malaisie comme Etat défendeur, [et] ne saurait … affecter aucune question relative à la charge de la preuve» (CR 2002/27, p. 13). Les avocats de la Malaisie semblent avoir perdu de vue cette mise en garde.

8. La Malaisie est un occupant (pacifique) sans titre et l'Indonésie demande seulement à être rétablie dans ses droits — en cela, mais en cela seulement, elle est demanderesse. Mais il appartient aux deux Parties de prouver le titre dont elles se réclament. L'Indonésie l'a fait; la Malaisie, ne l'a pas fait. En conséquence, il vous appartient, Madame et Messieurs de la Cour, de décider que les deux îles relèvent de sa souveraineté, sans vous laisser intimider par le tardif fait accompli dont se prévaut maintenant la Partie malaisienne.

9. Au demeurant, ceci n'implique nullement que la décision que vous serez conduits à rendre entraînera une remise en cause des droits des sociétés privées auxquelles la Malaisie a confié l'exploitation touristique de Sipadan : il résulte de votre jurisprudence que telle n'est pas l'implication des arrêts que vous rendez en matière de souveraineté territoriale (cf., arrêts du

22 décembre 1986, *Différend frontalier, C.I.J. Recueil 1986*, p. 617, par. 116 ou du 11 septembre 1992, *Différend frontalier terrestre, insulaire et maritime, C.I.J. Recueil 1992*, p. 419, par. 97); et l'Indonésie est ouverte aux investissements étrangers.

10. C'est sans inquiétude, Madame et Messieurs de la Cour, que l'Indonésie attend l'arrêt par lequel vous constaterez que la souveraineté sur Pulau Ligitan et Pulau Sipadan lui appartient.

Monsieur le président, Madame et Messieurs les juges, je vous remercie très vivement de l'attention que vous avez bien voulu me prêter à nouveau tout au long de cette procédure; et je vous prie, Monsieur le président, de bien vouloir appeler à cette barre M. l'agent de l'Indonésie pour de très brèves remarques finales.

Le PRESIDENT : Je vous remercie Monsieur le professeur. Et je donne maintenant la parole à S. Exc. M. l'agent de l'Indonésie.

Mr. WIRAJUDA: Thank you, Mr. President.

1. Mr. President, Members of the Court, at this final stage of Indonesia's oral presentation, it falls to me to make a few closing remarks and to present Indonesia's submissions in this case.

2. I would first like to remind the Court that, ever since Malaysia laid claim to Pulau Sipadan and Pulau Ligitan in 1969, it has been Indonesia's firm understanding that neither Party would undertake any activity that could in any way prejudice the final settlement of this dispute. As the Court is well aware, it was only in the late 1980s that Malaysia began to permit tourism on Sipadan to be developed.

3. Prior to that time, the 4° 10' N line had provided a basis of stability for the Parties. Both Indonesia and Malaysia had respected the line throughout the 1960s in the conduct of their offshore petroleum operations without any friction, and in the publication of maps. They respected the line again in their mutual erection of navigational aids later on. Mr. President, the line worked well, as it had ever since 1891 — nearly 80 years.

4. The discussions between our two countries on the delimitation of their respective maritime areas could not be completed in 1969 because of the emergence of the dispute. Indonesia looks forward to being able to resume those discussions following the Court's judgment in this case.

5. I would also like to assure the Court that, should the Court decide that Pulau Sipadan and Pulau Ligitan fall within the sovereignty of Indonesia, as Indonesia believes to be the case, the Government of Indonesia will respect any private rights that have been acquired in accordance with Indonesia's existing laws and regulations.

6. It is with these considerations in mind, which we believe appropriate in order to promote the continued stability and spirit of good neighbourliness in the region, particularly as between Malaysia and Indonesia, that I wish to present the final submissions of my Government.

7. On the basis of the facts and legal considerations presented in Indonesia's written pleadings and its oral presentation, the Government of the Republic of Indonesia respectfully requests the Court to adjudge and declare that:

(i) Sovereignty over Pulau Ligitan belongs to the Republic of Indonesia; and

(ii) Sovereignty over Pulau Sipadan belongs to the Republic of Indonesia.

8. Finally, on behalf of the Government of the Republic of Indonesia, I would like to express my deep appreciation to you, Mr. President and Members of the Court, as well as to our distinguished Malaysian colleagues, for your attention and courtesy to Indonesia's presentation. I would also like to thank the staff of the Registry and the interpreters for their hard work in contributing to the smooth and efficient conduct of these proceedings. I thank you, Mr. President.

The PRESIDENT: Thank you very much, Mr. Minister. Ceci met un terme au deuxième tour de plaidoiries de la République d'Indonésie. La Cour prend note des conclusions finales de la République d'Indonésie. La prochaine séance aura lieu mercredi 12 juin à [illegible] heures pour le deuxième tour de plaidoiries de la Malaisie. La séance est levée.

L'audience est levée à 16 h 30.

CR 2002/35

International Court of Justice
THE HAGUE

Cour internationale de Justice
LA HAYE

YEAR 2002

Public sitting

held on Wednesday 12 June 2002, at 10 a.m., at the Peace Palace,

President Guillaume presiding,

***in the case concerning* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)**

VERBATIM RECORD

ANNÉE 2002

Audience publique

tenue le mercredi 12 juin 2002, à 10 heures, au Palais de la Paix,

sous la présidence de M. Guillaume, président,

***en l'affaire relative à la* Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie)**

COMPTE RENDU

Present:	President	Guillaume
	Vice-President	Shi
		Ranjeva
		Herczegh
		Fleischhauer
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
	Judges *ad hoc*	Weeramantry
		Franck
	Registrar	Couvreur

The Government of the Republic of Indonesia is represented by:

H. E. Dr. N. Hassan Wirajuda, Minister for Foreign Affairs,

as Agent;

H. E. Mr. Abdul Irsan, Ambassador of Indonesia to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Alfred H. A. Soons, Professor of Public International Law, Utrecht University,

Sir Arthur Watts, K.C.M.G., Q.C., Member of the English Bar, Member of the Institute of International Law,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Ms Loretta Malintoppi, *avocat à la Cour d'appel de Paris*, Member of the Rome Bar, Frere Cholmeley/Eversheds, Paris

as Counsel and Advocates;

Mr. Charles Claypoole, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Mathias Forteau, Lecturer and Researcher at the University of Paris X-Nanterre, Researcher at CEDIN — Paris X (Nanterre)

as Counsel;

Mr. Hasyim Saleh, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague,

Dr. Rachmat Soedibyo, Director General for Oil & Natural Resources, Department of Energy & Mining,

Major General S. N. Suwisma, Territorial Assistance to Chief of Staff for General Affairs, Indonesian Armed Forces Headquarters,

Mr. Donnilo Anwar, Director for International Treaties for Politics, Security & Territorial Affairs, Department of Foreign Affairs,

Mr. Eddy Pratomo, Director for International Treaties for Economic, Social & Cultural Affairs, Department of Foreign Affairs,

Mr. Bey M. Rana, Director for Territorial Defence, Department of Defence,

Mr. Suwarno, Director for Boundary Affairs, Department of Internal Affairs,

Mr. Subyianto, Director for Exploration & Exploitation, Department of Energy & Mining,

Mr. A. B. Lapian, Expert on Borneo History,

Mr. Kria Fahmi Pasaribu, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague,

Mr. Moenir Ari Soenanda, Minister Counsellor, Embassy of the Republic of Indonesia, Paris,

Mr. Rachmat Budiman, Department of Foreign Affairs,

Mr. Abdul Havied Achmad, Head of District, East Kalimantan Province,

Mr. Adam Mulawarman T., Department of Foreign Affairs,

Mr. Ibnu Wahyutomo, Department of Foreign Affairs,

Capt. Wahyudi, Indonesian Armed Forces Headquarters,

Capt. Fanani Tedjakusuma, Indonesian Armed Forces Headquarters,

Group Capt. Arief Budiman, Survey & Mapping, Indonesian Armed Forces Headquarters,

Mr. Abdulkadir Jaelani, Second Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Daniel T. Simandjuntak, Third Secretary, Embassy of the Republic of Indonesia, The Hague,

Mr. Soleman B. Ponto, Military Attaché, Embassy of the Republic of Indonesia, The Hague

Mr. Ishak Latuconsina, Member of the House of Representatives of the Republic of Indonesia,

Mr. Amris Hasan, Member of the House of Representatives of the Republic of Indonesia,

as Advisers;

Mr. Martin Pratt, International Boundaries Research Unit, University of Durham,

Mr. Robert C. Rizzutti, Senior Mapping Specialist, International Mapping Associates,

Mr. Thomas Frogh, Cartographer, International Mapping Associates

as Technical Advisers.

The Government of Malaysia is represented by:

H. E. Tan Sri Abdul Kadir Mohamad, Ambassador-at-Large, Ministry of Foreign Affairs

as Agent;

H. E. Dato' Noor Farida Ariffin, Ambassador of Malaysia to the Kingdom of the Netherlands

as Co-Agent;

Sir Elihu Lauterpacht, Q.C., C.B.E., Honorary Professor of International Law, University of Cambridge, Member of the *Institut de Droit International*,

Mr. Jean-Pierre Cot, Emeritus Professor, University of Paris-I (Panthéon-Sorbonne), Former Minister,

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the English and Australian Bars, Member of the Institute of International Law,

Mr. Nico Schrijver, Professor of International Law, Free University, Amsterdam and Institute of Social Studies, The Hague; Member of the Permanent Court of Arbitration

as Counsel and Advocates;

Dato' Zaitun Zawiyah Puteh, Solicitor-General of Malaysia,

Mrs. Halima Hj. Nawab Khan, Senior Legal Officer, Sabah State Attorney-General's Chambers,

Mr. Athmat Hassan, Legal Officer, Sabah State Attorney-General's Chambers,

Mrs. Farahana Rabidin, Federal Counsel, Attorney-General's Chambers

as Counsel;

Datuk Dr. Nik Mohd. Zain Hj. Nik Yusof, Secretary General, Ministry of Land and Co-operative Development,

Datuk Jaafar Ismail, Director-General, National Security Division, Prime Minister's Department,

H. E. Ambassador Hussin Nayan, Under-Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Ab. Rahim Hussin, Director, Maritime Security Policy, National Security Division, Prime Minister's Department,

Mr. Raja Aznam Nazrin, Principal Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Zulkifli Adnan, Counsellor of the Embassy of Malaysia in the Netherlands,

Ms Haznah Md. Hashim, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs,

Mr. Azfar Mohamad Mustafar, Assistant Secretary, Territorial and Maritime Affairs Division, Ministry of Foreign Affairs

as Advisers;

Mr. Hasan Jamil, Director of Survey, Geodetic Survey Division, Department of Survey and Mapping,

Mr. Tan Ah Bah, Principal Assistant Director of Survey, Boundary Affairs, Department of Survey and Mapping,

Mr. Hasnan Hussin, Senior Technical Assistant, Boundary Affairs, Department of Survey and Mapping

as Technical Advisers.

Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte et nous allons entendre le second tour de plaidoiries pour la Malaisie. Je donne immédiatement la parole au professeur Jean-Pierre Cot.

M. COT :

LA CONVENTION DU 20 JUIN 1891

Monsieur le président, Madame et Messieurs de la Cour,

1. Il me revient l'honneur d'ouvrir ce second tour de plaidoiries au nom de la Malaisie. Dans ma plaidoirie, j'examinerai les arguments présentés au nom de l'Indonésie par ses conseils lundi au sujet du traité de 1891. Le professeur Schrijver qui me succèdera reviendra sur les positions du gouvernement de La Haye. Le professeur Crawford abordera les problèmes posés par la succession au titre territorial et les cartes. Sir Eli Lauterpacht examinera pour sa part les effectivités. Enfin Son Excellence Tan Sri Kadir conclura ce second tour. Nous pensons Monsieur le président pouvoir exposer nos thèses en une matinée, répondant ainsi à votre souhait de brièveté et de concision.

2. Monsieur le président, les trois tours de procédure écrite et les deux tours de procédure orale ont permis de décanter cette affaire, sinon de rapprocher les positions des Parties. Nous avons ainsi pu écarter les faux problèmes, rectifier les erreurs, grandes ou petites.

3. Le professeur Soons a bien fait de me reprendre sur l'inexcusable confusion entre Batavia et Surabaya. Je confirme décidément le cliché : les Français ne connaissent pas leur géographie !

4. Plus significatif peut-être, sir Arthur, dans sa talentueuse plaidoirie, a nuancé pour sa part les affirmations de l'Indonésie sur deux points importants : 1) il n'y a jamais eu de proposition britannique de périmètre d'allocation soumise à la partie néerlandaise; 2) la carte du «Mémorandum explicatif n° 3», n'a jamais été communiquée aux autorités britanniques. Ces précisions sont de nature à aider la Cour à trancher le litige qui lui est soumis, je vais tenter de le démontrer.

I. Il n'y a jamais eu de proposition britannique de périmètre d'attribution

5. Le Gouvernement britannique n'a jamais soumis aux Pays-Bas la proposition de tracer une ligne en haute mer jusqu'au méridien 118° 44' 30" de longitude est. Il n'a jamais soumis à son partenaire lors des négociations officielles une carte portant prolongation en haute mer du parallèle 4° 10' ou d'un parallèle quelconque. Dont acte.

6. Mais il faut aller plus loin, j'en conviens volontier. Sir Arthur Watts a expliqué que, fasciné par le tour de magie, je n'avais pas saisi l'essentiel : les négociateurs britanniques avaient bien en tête un périmètre d'attribution, comme le montrent les croquis et notes conservés dans les archives britanniques[1]. Mais Monsieur le président, si cela était si évident, pourquoi ne l'a-t-on pas dit ? Dans le texte ou au cours des longues négociations préalables.

7. Reprenons le texte de l'article IV de la convention de 1891. D'après mon éminent contradicteur, le texte est clair : la ligne du parallèle 4° 10', d'après ces dispositions, continue de courir, «across», donc «beyond» l'île de Sebatik. D'après nous, d'après la Malaisie, le texte est clair : la frontière traverse l'île de Sebatik de part en part, afin — seconde partie de la phrase — de partager l'île entre les deux parties. Et chacun de part et d'autre de la barre, d'invoquer à l'appui de son texte clair les arguments sémantiques et les références linguistiques qui s'imposent.

8. Monsieur le président, supposons un instant — ce n'est pas la thèse de la Malaisie, vous l'avez compris —, supposons un instant, dis-je, que le texte n'est pas clair. Que ces deux interprétations, aussi évidentes l'une que l'autre, indiquent une ambiguïté, une polysémie. Il faut alors poursuivre le processus d'interprétation par recours aux travaux préparatoires.

9. Ah non ! s'exclame mon contradicteur. Impossible, puisque le texte est clair. Et de verrouiller ainsi le processus d'interprétation en posant le préalable de l'irrecevabilité du recours aux travaux préparatoires[2].

10. Sir Arthur précise que, si les parties ont clairement formulé leur volonté, il ne faut pas détricoter le résultat par un recours imprudent aux travaux préparatoires[3]. La Partie indonésienne, Madame et Messieurs de la Cour, cherche ainsi à enfermer la Cour dans la pétition de principe.

---

[1] CR 2002/33, p. 18, par. 31 (Watts).

[2] CR 2002/33, p. 18, par. 29-30 (Watts).

[3] CR 2002/33, p. 18, par. 29 (Watts).

Pourquoi ? Parce que nos adversaires savent pertinemment que rien, dans les travaux préparatoires, ne confirme en quoi que ce soit leurs dires. Rien.

11. Pour notre part, Monsieur le président, nous croyons légitime dans le cas présent le recours aux travaux préparatoires. Voyons s'ils confirment la thèse du texte clair avancé par l'une ou par l'autre Partie. Vous le rappeliez dans l'affaire du *Différend territorial (Jamahiriya arabe Libyenne/Tchad)* :

> «La Cour ne considère pas nécessaire de recourir aux travaux préparatoires pour élucider le contenu du traité de 1955; toutefois, comme dans d'autres affaires, elle estime pouvoir, en se référant à ces travaux, confirmer la lecture qu'elle fait du texte du traité...»[4]

12. Ce recours aux travaux préparatoires me paraît d'autant plus s'imposer ici qu'il s'agit ou non de déterminer un périmètre d'attribution. Or mon éminent contradicteur a admis que la plupart des périmètres d'attribution sont explicitement définis, même si le langage peut varier. Il n'a pas trouvé d'exemple contraire de périmètre implicite. Il a sans doute ajouté que la convention de 1891 constituait un exemple de *«variation»*, une exception pour tout dire[5]. Peut-être. C'est possible. Encore faut-il alors prouver que les parties ont entendu déroger à la pratique commune en matière de périmètres d'attribution.

13. Car Monsieur le président, on en revient toujours à la même question. Si les Parties ont entendu tracer un périmètre d'attribution, pourquoi ne l'ont-elles pas dit ? Pourquoi une formule ambiguë ? Pourquoi ce silence de la correspondance diplomatique ? Pourquoi ce mutisme des commissaires tant britanniques que néerlandais lors des trois réunions de la commission jointe ? Cette question là fondamentale à mes yeux, sir Arthur Watts s'est bien gardé d'y répondre. Parce qu'il n'a pas la réponse.

II. La carte du «Mémorandum explicatif n° 3» n'a pas été communiquée au Gouvernement britannique

14. Mon contradicteur qui réfute le recours aux travaux préparatoires, nous venons de le voir, ne peut s'opposer de la même manière à l'examen de la procédure de ratification de la convention de 1891 par les états généraux, parce qu'il a désespérément besoin de la carte annexée au

---

[4] *C.I.J. Recueil 1994*, p. 27, par. 55.

[5] CR 2002/33, p. 23, par. 48 (Watts).

«Mémorandum explicatif n° 3». Or les travaux approfondis des états généraux sont tout aussi silencieux sur un hypothétique périmètre d'attribution. Nous l'avons constaté vendredi dernier; je n'y reviens pas[6].

15. Venons-en maintenant directement à la carte. *«The map was not officially communicated»*, sir Arthur ne peut pas le contester[7]. Mais c'est pour ajouter aussitôt que j'élève le pédantisme et le formalisme à un niveau absurde. Permettez-moi, Monsieur le président, de faire ici l'éloge, sinon du pédantisme, du moins d'un minimum de formalisme. Je sais bien que le droit international n'attache pas aux formes la même importance que le droit interne. Mais à trop méconnaître les formes, c'est la sécurité des transactions juridiques que l'on menace. Il vous appartient, Madame et Messieurs de la Cour, dans la présente affaire, d'établir le juste équilibre entre l'absence de formalisme et la sécurité juridique qui doit permettre de s'assurer de la réalité du consentement de l'Etat. Et plus précisément, en l'instance présente, la vérification du consentement britannique à l'établissement d'un périmètre d'attribution. La Cour l'a rappelé dans l'affaire du *Temple de Préah Vihéar* : «le droit international insiste particulièrement sur les intentions des parties, lorsque la loi ne prescrit pas de forme particulière, les parties sont libres de choisir celle qui leur plait, pourvu que leur intention en ressorte clairement»[8].

16. Si la carte avait été officiellement communiquée aux autorités britanniques, elle aurait sans doute provoqué une obligation de réaction. Mais tel n'a pas été le cas. Dès lors, nous entrons dans la zone plus imprécise de l'acquiescement, voire de l'*estoppel*.

17. Comme le notait Paul Reuter à cette même barre et dans la même affaire du *Temple de Préah Vihéar* :

> «Sans avoir à entrer ici dans toutes les finesses, qui sont grandes, de l'analyse juridique anglo-saxonne, il faut simplement relever que dans les relations internationales la doctrine fait de l'*estoppel* un mécanisme répondant au principe général de la bonne foi et au besoin de sécurité qui régit les sociétés humaines.»[9]

---

[6] CR 2002/31, p. 31-34, par. 80-90 (Cot).

[7] CR 2002/33, p. 27, par. 71 (Watts). Voir cependant Loretta Malintoppi pour qui la carte annexée fut «communiquée à leurs interlocuteurs britanniques qui ne l'ont nullement contestée» (CR 2002/34, p. 14).

[8] *C.I.J. Recueil 1961*, p. 31.

[9] Cité par Jennings, «The Acquisition of Territory in International Law», p. 41, note 3.

Ce sont en effet le principe général de la bonne foi et le besoin de sécurité qui éclairent votre jurisprudence en la matière. Et qui conduisent notamment à ne pas conclure hâtivement à l'existence d'un *estoppel* ou d'un acquiescement là où il n'y en a pas.

18. Or je ne relève dans notre affaire aucune trace d'acquiescement, aucun indice du consentement du Gouvernement britannique à la carte annexée au «Mémorandum explicatif n° 3». Je relève encore moins d'acquiescement plus précis à la prolongation de la ligne rouge en haute mer. Le Gouvernement britannique n'a jamais indiqué, par un mot, par un geste, par un comportement, son acquiescement à un tel tracé. Dans ces conditions, admettre la carte comme une expression des vues du Gouvernement néerlandais, soit. L'admettre comme preuve du consentement britannique, non. Nous le savons, une signature sur un coin de table par une personne habilitée à engager l'Etat sur le plan international suffit sans doute. Mais là, il n'y a même pas signature, communiqué, déclaration, acte juridique, acte matériel. La règle de base en la matière reste le consentement, quelle qu'en soit la forme. C'est ce consentement qui fait défaut.

19. J'ajoute qu'il n'y a pas eu, par la suite, la moindre utilisation de la carte, la moindre occasion de réagir, le moindre comportement de nature à créer une pratique ultérieure dans l'application du traité à ce propos. S'agissant d'une affaire aussi sérieuse qu'une délimitation territoriale, Monsieur le président, la diplomatie des arrière-pensées ou des froncements de sourcils ne suffit pas.

20. Enfin, les conditions de l'*estoppel* ne sont évidemment pas réunies. On ne voit pas où se trouve le changement de position d'une partie et moins encore le préjudice subi par l'autre. Au demeurant, substituer à l'exigence d'un consentement clair une attitude ou un silence lors d'une négociation ou d'un échange diplomatique est hasardeux pour le moins.

21. La Cour a eu l'occasion de le relever dans l'affaire *Elettronica Sicula S.p.A.* :

> «[B]ien qu'on ne puisse exclure qu'un *estoppel* puisse, dans certaines circonstances, découler d'un silence, lorsqu'il aurait fallu dire quelque chose, il est évidemment difficile de déduire l'existence d'un *estoppel* du simple fait de n'avoir pas mentionné une question à un moment donné au cours d'échanges diplomatiques assez intermittents.»[10]

---

[10] *C.I.J. Recueil 1989*, p. 44.

22. Ici, nous sommes très en deçà de l'hypothèse envisagée par la Cour dans l'affaire *ELSI*, puisque la carte annexée au «Mémorandum explicatif n° 3» ne s'intégrait même pas à des «échanges diplomatiques intermittents». Déduire l'expression d'un consentement, qu'on l'appelle acquiescement ou *estoppel*, du silence britannique face à la production d'une carte dans un débat parlementaire interne me paraît constituer une extrapolation de l'expression de la volonté au-delà de toute raison.

23. En somme la carte annexée au «Mémorandum explicatif n° 3» me paraît appelée au même destin que le rapport Eason dans l'affaire de l'*Ile de Kasikili/Sedudu*. Dans son arrêt, la Cour :

> «relève en effet que ledit rapport semble n'avoir jamais été communiqué à l'Allemagne et avoir toujours conservé un caractère interne. Par ailleurs, la Cour observe que le Gouvernement britannique lui-même n'a jamais donné de suite à ce rapport, ni après son établissement ... ni ultérieurement...»[11]

24. Comme le rapport Eason, la carte du «Mémorandum explicatif n° 3» a toujours conservé un caractère interne. Le Gouvernement néerlandais ne lui a jamais donné suite, ni après son établissement, ni ultérieurement.

25. Monsieur le président, sir Arthur Watts a repris l'analogie entre la carte du «Mémorandum explicatif n° 3» et la carte du *Livre jaune*, qui avait été analysée par la Cour dans l'affaire du *Différend territorial (Jamahiriya arabe libyenne/Tchad)* certains s'en souviendront. Je crois que ce rapport commet un contre-sens. Il analyse en effet la carte du *Livre jaune* comme une interprétation authentique de l'accord conclu entre la France et la Grande-Bretagne le 21 mars 1899.

26. Mais la Cour ne s'est jamais prononcée sur ce point, car ce n'était pas la question qui lui était posée. La question lui était soumise était de savoir à quelle carte la France et l'Italie — l'Italie, non la Grande-Bretagne — faisaient référence dans l'échange de lettres des 1^er^ et 2 novembre 1902 lorsque les parties précisaient :

> «Il a été expliqué à cette occasion que, par la limite de l'expansion française en Afrique septentrionale ... on entend bien la frontière de la Tripolitaine indiquée par la carte annexée à la déclaration du 21 mars 1899, additionnelle à la convention franco-anglaise du 14 juin 1898.»[12]

---

[11] *C.I.J. Recueil 1999*, p. 1078, par. 55.

[12] Mémoire du Tchad, livre I, p. 174-175 et livre II, annexes 78-80.

27. Dans son arrêt, la Cour constate que : «La carte ainsi mentionnée ne pouvait être que celle du *Livre jaune* sur laquelle figurait une ligne en pointillé indiquant la frontière de la Tripolitaine»[13].

28. En d'autres termes, et dans cette affaire, il s'agissait pour la Cour d'*identifier* la carte intégrée dans le règlement conventionnel de 1902 entre la France et l'Italie, non pas d'*apprécier la portée juridique* entre la France et la Grande-Bretagne, de la carte publiée par la France dans le *Livre jaune* au lendemain de la conclusion de l'accord de 1899. Dans la présente affaire, la carte du «Mémorandum explicatif n° 3» n'a jamais été, que je sache, intégrée à un règlement conventionnel ultérieur. J'ajoute que l'Italie s'est prévalue de la carte du *Livre jaune* dans des négociations ultérieures[14] à propos de l'affaire *Libye/Tchad*. Tandis qu'ici, ni la Grande-Bretagne, ni les Pays-Bas, n'ont fait la moindre référence à la carte du «Mémorandum explicatif» par la suite. La carte du «Mémorandum explicatif n° 3» est ainsi restée enterrée dans les archives parlementaires néerlandaises et, pour information, dans les archives du Foreign Office.

29. J'en viens à l'accord de Tawao et à l'accord de 1915 qui lui a conféré valeur conventionnelle. Mon contradicteur propose en effet une lecture nouvelle, innovante, révolutionnaire de l'accord[15]. Il s'agit en l'espèce, ni plus ni moins, de supprimer l'alinéa 1), celui qui déclare : *«(1) Traversing the island of Sebitik, the frontier line follows the parallel of 4° 10' north latitude, as already fixed by the Boundary Treaty and marked on the east and west coasts by boundary pillars.»*

30. Je comprends que cet alinéa 1) embarrasse la partie indonésienne. Dans le rapport la frontière est décrite d'est en ouest. L'alinéa 1) précise d'où vient la frontière. Elle vient de la côte orientale de l'île de Sebatik, pas de plus loin. Pour nos amis indonésiens -- et c'est toute la virtuosité de ce rapport qui a été ainsi mis a contribution -- il vaut donc mieux ignorer la disposition, la réputer non-écrite. Notons, cette manie curieuse qu'a l'Indonésie d'élaguer les textes. L'Indonésie avait déjà proposé, vous vous en souvenez, de supprimer le second alinéa de

---

[13] Arrêt du 3 février 1994, *C.I.J. Recueil 1994*, p. 33, par. 61.

[14] Réplique du Tchad, livre I, p. 54.

[15] CR 2002/33, p. 30-32, par. 84-94 (Watts). Les écrits de l'Indonésie et la première intervention de sir Arthur étaient plus classiques. Cf. mémoire de l'Indonésie, vol. 1, p. 97, par. 5.65; contre-mémoire, vol. 1, p. 100-104, par. 5.104-5.113; réplique, vol. 1, p. 48-52, par. 2.42-2.47.

l'article IV de la convention de 1891. Cela devient comme un réflexe, comme une manie, un peu comme ces jardiniers français qui se croient obligés d'élaguer systématiquement les arbres pour les mettre en conformité avec la perspective souhaitée : l'école de Le Nôtre de Versailles. Je préfère pour ma part, Monsieur le président, les jardins à l'anglaise, surtout en matière d'interprétation des traités.

31. Notons le préambule de l'article 3 du rapport :

> «We have determined the boundary between the Netherland territory and the State of British North Borneo, as described in the Boundary Treaty supplemented by the interpretation of Article 2 of the Treaty mutually accepted by the Netherland and British Governments in 1905, as taking the following course.»

32. Nulle restriction dans tout cela. Nulle volonté des commissaires de limiter leurs travaux à une stricte opération de démarcation terrestre. Je vous engage à jeter un coup d'œil sur cet accord, que nous avons inclus pour votre commodité dans votre dossier sous la cote 76. On y retrouve cette perspective d'une délimitation ou d'une détermination de la frontière — les deux termes sont employés, à l'exclusion de celui de «démarcation» — dans le préambule de l'accord, proprement dit, signé par le secrétaire au Foreign Office et l'ambassadeur des Pays-Bas.

33. Revenons au texte de l'accord : *«Taking the following course»*, la frontière traverse l'île de Sebatik d'est en ouest en suivant le parallèle 4° 10', puis, à partir de la borne posée sur la rive occidentale de l'île, elle suit le parallèle vers l'occident jusqu'au milieu du chenal… Et la carte, nous l'avons vu la semaine dernière, confirme cette interprétation. La frontière commence bien à l'East Corner de Sebatik. Elle ne vient pas du grand large. C'est ce que nous vous demandons de dire et juger.

34. Au terme de cette plaidoirie, Monsieur le président, je prends congé de la Cour. Monsieur le président, Madame, Messieurs de la Cour, je vous remercie pour votre attention. Monsieur le Président, je vous prie maintenant de donner la parole à mon collègue, le professeur Nico Schrijver.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole au professeur Nico Schrijver.

Mr. SCHRIJVER: Thank you.

DUTCH CLAIMS AND PRACTICE WITH RESPECT TO NORTH-EAST BORNEO AND THE ISLANDS IN DISPUTE

Introduction

1. Mr. President, Members of the Court. I shall briefly respond to issues raised by counsel of Indonesia with respect to, firstly, the Sultanate of Bulungan; secondly, Dutch claims of sovereignty east of Batu Tinagat and to the islands of Ligitan and Sipadan; and, thirdly, the internal Dutch deliberations during the 1920s on the absence of a maritime boundary.

I. The Sultanate of Bulungan did not hold any title to the islands

2. As regards the Sultanate of Bulungan, Malaysia still finds difficulty in grasping what in fact the position of Indonesia is. In the written pleadings we could note a waning interest in Bulungan as a basis of Indonesia's claim to the two islands, to the extent that Indonesia in its Reply stated that the pre-1891 history was "an irrelevance"[16]. In our first round we noted that Sir Arthur Watts advised the Court that there was no need for it to consider the rival claims of the Sultan of Bulungan and the Sultan of Sulu[17]. Indonesia plainly admitted that too many uncertainties and ambiguities existed. However, in the second round of these hearings Professor Soons steadfastly maintained, despite all the evidence to the contrary, that "through contracts with the Sultan of Boeloengan, the Netherlands acquired title to Sipidan and Ligitan"[18]. In a similar vein, Professor Pellet summarized, that should the Court not accept Indonesia's title to the islands based on the 1891 Boundary Convention, its sovereignty could alternatively still be vested on its succession to the title of the Sultan of Bulungan[19].

3. However, it is a clear matter of reading black and white that the 1850 and the 1878 contracts between the Sultan and the Netherlands as well as the 1893 updated official "Description of the Territory of Boeloengan and List of Islands Belonging Thereto" show this simply was *not* the case. The 1878 and 1893 documents state that the islands belonging to Bulungan are Sebatik,

---

[16] See Reply of Indonesia, p. 9, para. 1.5, and p. 101, para. 5.40 (*f*).

[17] CR 2002/30, p. 38, para. 4 (Mr. Schrijver).

[18] CR 2002/33, p. 33, para. 2.

[19] CR 2002/34, p. 37, para 3.

Nunukan and Tarakan as well as the small islands belonging thereto[20]. Apart from the literal meaning of this text, any reasonable interpretation cannot bring islands some dozens of miles from the coast within the scope of the phrase "islets belonging thereto". Indonesia chose to ignore these facts — for obvious reasons.

4. Furthermore, the Ligitan group of islands did not fall within the area disputed by the Dutch and British during the 1880s, between the Sibuku River and Batu Tinagat. This consisted of a part of the mainland of East Borneo and the islands on the coast, most notably Sebatik and Nunukan, as can even be noted from the Dutch internal map attached to the Explanatory Memorandum.

5. Professor Soons discussed some of the features of the Sultanate of Bulungan. Let me make clear for the record that Malaysia never did assert that Bulungan was a "*purely* land-based Sultanate", as Professor Soons claimed on Monday[21]. Here I just would like to refer the Court to the expert report by Professor Houben, identifying Bulungan as "a small coastal Sultanate with limited territorial reach"[22]. By contrast, Sulu was of course a typical maritime Sultanate.

6. [Project ethnographic map, insert 3, MR] Professor Soons also referred to the fact that the coastal population, particularly Bugis, participated in fishing and maritime trading. Malaysia already recorded this in its Memorial and its Reply[23]. Reportedly, during the nineteenth century they bartered forestry products for slaves from the Sulu region. Yet, the Bugis in Bulungan were small in number[24]. This can also be demonstrated — and please excuse me if I allow myself to be carried away for a moment — in the beautifully produced and probably first ethnographic map of Borneo, made in 1917, now on the screen and included in your folders under tab 78, from the archives of the Royal Tropical Institute in Amsterdam[25]. As you can see from the pink coloured areas, the Bugis, originating in South Sulawesi, lived mainly along the coast in south-eastern and western Borneo rather than in north-eastern Borneo.

---

[20] See Memorial of Malaysia, Vol. 2, Ann. 11, p. 41 and Vol. 3, Ann. 54.

[21] CR 2002/33, p. 33, para. 5.

[22] See Ann. to Counter-Memorial of Malaysia, p. 15.

[23] Counter-Memorial of Malaysia, p. 25, para. 3.4; Reply of Malaysia, p. 25, para. 3.4.

[24] See literature referred to in written pleadings, particularly the articles by Von Dewall (1855) and Gallois (1856) and the books by Lindblad (1988), Sather (1997) and Warren (1981).

[25] See Reply of Malaysia, insert 3, p. 26.

7. Mr. President, by the end of this case we will all have become specialists on Bulungan. [End of graphic] And there is no evidence that the Sultan of that Bulungan ever exercised the slightest authority over islands far off the coast; as a matter of fact, all the evidence is to the contrary.

II. Supposed Dutch claims to east of Batu Tinagat and the islands

8. I would now like to turn to the supposed Dutch claims to the islands. The Dutch colonial administration over the area spanned nearly a century. There can be little doubt that this particular area of Borneo was really on the fringes of the Dutch colonial area, as was repeatedly admitted by the Dutch Ministers of Colonies and Foreign Affairs in their discussions with Parliament.

9. Furthermore, as we noted in the first round, the period from 1830 until approximately 1890 is viewed within recent Dutch historiography as being marked by self-restraint and a policy of "abstention" towards the outer islands. Indonesia did not respond to this observation in its second round.

10. Nevertheless, Indonesia saw fit to argue that in the pre-1891 period the Dutch claims extended to various islands of the Ligitan Group, including even Mabul. These claims were never recorded or reported in any diplomatic contacts, diplomatic correspondence or parliamentary proceedings. All that Professor Soons mentions with respect to evidence of these supposed Dutch claims, are two incidents concerning a native boat on Mabul, incidents which indeed raised concern among BNBC officials in 1883[26]. In the relevant document which Malaysia has also included in the judges' folders under tab 79, there is an explicit reference to the fact that "the Dutch men-of-war are cruising in our [namely British] waters, north of the boundary they themselves claim"[27].

11. Furthermore, the document of W. H. Treacher, the first Governor of British North Borneo, makes once again perfectly clear that the Dutch and British were co-operating in combating piracy and slavery. As Governor Treacher put it in his letter: "I should be the last to underrate the good work done by the Dutch cruisers in suppressing piracy and slavery on their east

---

[26] CR 2002/33, p. 34, paras. 6 and 9.

[27] See Reply of Indonesia, Vol. 2, Ann. 2.

coast; but the people I refer to are not pirates or slave-dealers, and the boat in question was seized in North Borneo and not in Dutch waters."[28]

12. Apart from suppressing piracy and the slave trade in co-operation with the British, some Dutch ships were also involved in surveying. As we can read from the relevant logbooks these surveying activities included British North Borneo, including the coastline of, and islands and reefs off the coast of British North Borneo. Yet, this is not to say that such activities and the publication of nautical charts are to be interpreted as evidence of sovereignty and the exclusive right to display the activities of a State, as determined by Judge Huber in the *Island of Palmas* case[29]. The activities of Dutch ships *cannot* be interpreted as meeting the classical criteria of displaying exclusive authority. They were simply not exercises of defence of territory, let alone of territorial jurisdiction.

13. Mr. President, the Parties have debated the availability of reports in archives and in other sources. Of course, we assume that Indonesia is the best-informed authority on what is, and what is no longer available in Indonesia, and, if available, where the archives are now located. All Malaysia wanted to emphasize is that the Public Record Office in London and the General State Archives in The Hague still contain a wealth of relevant materials, including lists of movements of Dutch ships in the area, an uninterrupted chronological survey of destinations of naval vessels and reports of surveying activities in the Netherlands East Indies for the period 1894-1956, as well as a considerable number of logbooks. But both Parties have not been able to find any relevant reports, above the few reported in the pleadings.

14. Regarding archives on regional administrative centres: Malaysia also regrets that those of the local Dutch administration in Tarakan are no longer available. But, with due respect, these would not have been very important for our case. *Highly* relevant to our case are the archives of the Residency of the Southern and Eastern Division of Borneo, most notably the Memoranda of Transfer of the Residents and the mail reports on the region. Fortunately, nearly all of them are available in large quantity and can be found on microfiche in the General State Archives in The Hague. And these mail reports — these Memoranda of Transfer —provide us with an accurate

---

[28] *Ibidem.*

[29] *Island of Palmas (The Netherlands v. the United States)*, 2 *RIAA* (1928), p. 829.

picture of Dutch presence in, and administration of, the region of Bulungan. Hence, it is very significant that *none* of these Memoranda of Transfer and mail reports refer to the islands of Ligitan and Sipadan. Nor do the Dutch Annual Reports on the Colonies and parliamentary proceedings.

III. Internal Dutch deliberations in the 1920s on the absence of a maritime boundary

15. Mr. President, Members of the Court, I would now like to proceed to my next and last item: the internal Dutch deliberations in the 1920s. First of all, we have some difference of opinion with Indonesia as to what triggered this discussion on the absence of a maritime boundary east of Sebatik. There can be little doubt that it all started as a result of uncertainty with regard to the line to be adopted as the border between the Dutch and British and maritime areas near the island of Sebatik for the purpose of anti-piracy control.

16. As the Vice-Admiral stated in his letter dated 4 January 1922, which you find in its original form and in English translation under tab 80: "In the Agreement . . . concerning the boundary line between the Netherlands and the British protectorate in Borneo, no boundary line is set forth which separates the territorial seas of the Netherlands and the protectorate in question."[30] Obviously, the Vice-Admiral makes reference to the 1915 Agreement, with the accompanying treaty map, which was made public by official decree in the Netherlands East Indies in 1916, which you find under tab 81 of your folders[31].

17. Second, we have some difference of opinion with respect to the relevance of the fact that the Commander of the Naval Forces of the Netherlands East Indies initially opted for a boundary line perpendicular to the coast out of the three options under discussion — and not two as Professor Soons mistakenly said (para. 41). While we know from the Awards by the Tribunals in the *Guinea/Guinea-Bissau* case and *Eritrea/Yemen* case, as discussed by Professor Cot last Friday[32], that a maritime boundary line does not necessarily correspond with an allocation line, Malaysia continues to find it highly significant that during the extensive deliberations, none of the

---

[30] Reply of Malaysia, Ann. 4.

[31] Reply of Malaysia, Ann. 5.

[32] CR 2002/31, pp. 19-20.

officers involved in the Netherlands East Indies or The Hague ever referred to the existence of a maritime boundary or an allocation line east of Sebatik along the 4° 10' N parallel.

18. Thirdly, in response to my question why the Resident of the Southern and Eastern Division of Borneo repeatedly stated that in this particular area "there are no islands; only the open sea", Indonesia has nothing more to offer than that the Resident was stationed 900 km away and that he was not well informed[33]. By implication, this also applies to the Assistant Resident stationed much closer in Samarinda in Koetei. However, both of them should have known had the Dutch any claims to the islands of Ligitan and Sipadan, let alone had they been exercising actual sovereignty there .

19. Lastly, I would like to refer the Court to the Memorandum of the Legal Department of the Netherlands Ministry of Foreign Affairs, dated 8 August 1923. This Memorandum, included under tab 82 of your folders, is an extensive paper, well documented and with references to various handbooks on international law and the law of the sea, which show the tools of an Office of Legal Affairs at the time[34]. Whereas the Navy preferred a line perpendicular to the coast, the Legal Adviser advised the Ministers to maintain the continuation of the land boundary. His main reason for adopting the parallel of 4° 10' N is shown in his quotation from the 1891 Explanatory Memorandum to Parliament:

> "By this division of the island both the Netherlands and British North-Borneo will have that area of the island in possession which forms the shore of the waterway along which each has to reach the coastal area allocated to them; this is fair and rational."[35]

It confirms once more that the main concern was the access to their respective areas of the mainland of Borneo west and north-west of Sebatik.

20. Obviously, the various Dutch authorities did not regard the 4° 10' N line as an established maritime boundary. After receiving the report of the *Lynx* cruise, they would have certainly not jeopardized a claim to Sipadan and Ligitan by pressing for a boundary line perpendicular to the coast of Sebatik Island if they had thought Dutch sovereignty over the islands

---

[33] CR 2002/33, p. 43, para. 43.

[34] Counter-Memorial of Malaysia, Vol. 2, Ann. 5. See also Reply of Malaysia, para. 4.13.

[35] Memorial of Malaysia, Vol. 3, Ann. 51.

to the east of the coast of Sebatik was at stake. But the issue was just not considered during these lengthy and well documented internal Dutch deliberations spanning a period of five years.

21. Finally, Mr. President, there was a conspicuous silence on the part of Indonesia in response to Professor Crawford's list of 15 maps which showed conclusively that the islands of Sipadan and Ligitan were not considered to belong to the Sultanate of Bulungan or the Netherlands East Indies. In conclusion, the Sultan of Bulungan did not hold title to the islands in dispute, and neither did the Dutch in law or in practice. The internal Dutch deliberations in the 1920s provide evidence on the absence of a maritime boundary east of Sebatik.

22. Mr. President, distinguished Members of the Court, this concludes my intervention on the Dutch position with respect to the Sultanate of Bulungan and the islands. May I now invite you to call on Professor Crawford who will deal with Malaysia's title to the islands in dispute. Thank you, Mr. President, Members of the Court.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Je donne maintenant la parole au professeur Crawford.

Mr. CRAWFORD:

Malaysia's title to the islands in dispute

Introduction

1. Mr. President, Members of the Court, Professors Cot and Schrijver have shown, respectively, that the 1891 Convention does not sustain Indonesia's case, and that neither the Netherlands nor Indonesia (before 1969) ever made any claim to the two islands. That is, as it were, the case *against* Indonesia. I turn to deal with those aspects of the case *for* Malaysia which I discussed on Monday. As far as they concern, first, the legal basis of title itself, and secondly and secondarily, the map evidence. In short I will deal first with the legal case and then with the geographical or map case, in so far as this is necessary to respond to what Indonesia has said in its second round. Sir Elihu Lauterpacht will follow me and deal, on the same basis, with the aspect of the case for Malaysia which concerns administration.

A. Malaysia's title to the islands

2. I turn then to the documents and transactions which establish Malaysia's title to the islands. I need to address four topics.

(1) The 1885 Protocol and the *nemo dat* argument

3. On Monday both Sir Arthur Watts and Mr. Bundy dealt with the issues surrounding the 1885 Protocol, which I discussed in the first round. Mr. Bundy sought to show that neither the Convention nor any other evidence established Sulu or Spanish title to the islands[36]; Sir Arthur sought to refute the *nemo dat* argument[37]. Let me deal with them in that order.

4. As to the 1885 Protocol, Mr. Bundy complained that I had not taken you to its Article I[38]. You can see it on the screen, and the whole text of the Protocol is in your folders at tab 83. Article I says quite simply:

> "The Governments of Great Britain and of Germany recognise the sovereignty of Spain over the places effectively occupied, as well as over those places not yet occupied, of the Archipelago of Sulu (Jolo), of which the limits are laid down in Article II."

Thus — unlike the situation with the previous Protocol of 1877[39] between the same three States — Spanish sovereignty is now recognized over all places, whether or not they are actually occupied. The only exception is the areas covered by the Sulu grant of 1877, including islands within 9 nautical miles, and that is set out in Article III. This is all perfectly clear, and it has nothing to do with any requirement of Spanish notification. Sovereignty is vested by Articles I to III without any requirement, either of notification or of occupation. And in both respects you can contrast this with the Protocol of 1877. That was the basis for the legal advice of both the United States[40] and Great Britain[41] after 1900. Both items of legal advice were based upon the 1885 Protocol, unfortunately Mr. Bundy failed to discuss that legal advice on Monday. I commend those legal opinions to you again, both for their clear analysis of the situation, and for the evident absence of the slightest inkling that the Dutch might entertain claims to two of the islands. In this respect the facts underpinning the documents are as significant as the legal analysis they contain.

---

[36] CR 2002/33, p. 45, para. 4, p. 46, paras. 8-11 (Mr. Bundy).

[37] CR 2002/33, pp. 24-26, paras. 51-60 (Sir Arthur Watts).

[38] CR 2002/33, p. 47, para. 9 (Mr. Bundy).

[39] Memorial of Malaysia, Vol. 2, Ann. 5.

[40] Memorial of Malaysia, Vol. 3, Ann. 55.

[41] Memorial of Indonesia, Vol. 3, Ann. 109.

5. Mr. Bundy sought to discredit the evidence of Sulu control over the islands off the coast of North Borneo in the latter part of the nineteenth century[42], but he failed to heed Professor Pellet's newly adopted slogan, "some facts are better than no facts". Perhaps most striking was Mr. Bundy's dismissal of the — what he described as — private map, taken from the second edition of the *General Atlas of the Netherlands Indies*. As you will recall, this map of 1870 clearly showed the two islands, by name, as part of the dominions of Sulu[43]. Mr. Bundy complained that the two responsible Dutch officials who produced that map got their geography distorted[44]. This, he seemed to conclude, was evidence of *Dutch* control over the islands through Bulungan. It was as if, because these Dutch officials could not accurately depict the region, north-east of Sebatik, therefore the Dutch controlled the region. The logic was not easy to follow; but in any event there is no doubt that the map depicts the two islands as lying beyond the proclaimed horizon of Dutch interest and activity and as part of the dominions of Sulu off the north-east coast of Borneo.

6. Of course, from a forensic point of view, Mr. Bundy had to try to trash — if I can use an unattractive modern word — all the pre-1878 evidence of Sulu control, just as Professor Pellet had to do for the BNBC period. For Indonesia now argues, subsidiarily and in the alternative[45], that the two islands actually belonged to the Sultan of Bulungan, who has to that limited extent come back to life after his earlier disappearance — it is a sort of existence in the alternative. The sequel to Agatha Christie's "The Strange Case of the Disappearing Sultan" is, we find, "The Sudden Return of the Sultan". But Inspector Schrijver, aided by his expert witness Professor Houben, has definitively excluded the possibility of a sequel. Some facts are better than no facts, and there are no facts supporting Bulungan's title to the islands.

7. Mr. Bundy also asserted once more that if Malaysia failed to demonstrate Sulu authority over the offshore islands, our case fails. But that, of course, is not true. What the 1885 Convention

---

[42] CR 2002/33, pp. 44-46, paras. 3-5 (Mr. Bundy).

[43] Memorial of Malaysia, Vol. 5, map 3.

[44] CR 2002/33, p. 45, para. 4 (4) (Mr. Bundy).

[45] CR 2002/34, 10 June 2002, p. 37, para. 3 (Professor Pellet).

shows perfectly clearly is that the British claim to North Borneo went no further that 9 nautical miles from the coast and that it did not include these islands. Indeed, from this point of view, it doesn't really matter so much whether the islands were Sulu or not. They were not British and therefore Britain could not, and could not have intended, silently to confer on the Dutch a treaty title to them.

8. Mr. President, Malaysia made the *nemo dat* argument in each round of our written pleadings[46], and last week[47]. Now for the first time Indonesia through Sir Arthur Watts has attempted to reply to it[48]. I am grateful to him.

9. What he said, on Monday, was that title to the two islands was uncertain, and that the Treaty produced certainty. But of course that does not work. Two things were certain about the position in 1890: (1) that the Sulu grant extended out to only 9 nautical miles (and thus did not include the islands), (2) that the Dutch did not claim areas or islands east of Batu Tinagat. Those things were certain, and they add up to an *incapacity* on the part of Britain to give the Dutch a treaty title or to recognize in the Dutch actual authority over the islands. It also demonstrates the absence of intention to do either of those things. It is true, there was great uncertainty inland, but there was no uncertainty in this respect as to the offshore islands beyond 9 nautical miles. It is clear from the Sulu Grant itself of 1878[49], from the Royal Charter of 1881[50], from the Protocol of 1885[51] and from the Protectorate Agreement of 1888[52].

10. Then there was a more subtle argument, which was at least hinted at by several of Indonesia's counsel[53]. It seems to run as follows: even if British North Borneo did not include the islands in 1891, it was open to Britain to promise that if in future it would acquire the islands, these would be passed on to the Dutch. In effect, Britain would become a sort of clearing agent for the

---

[46] Memorial of Malaysia, para. 8.22; Counter-Memorial of Malaysia, para. 3.29; Reply of Malaysia, paras. 1.8 (4), 1.14.

[47] CR 2002/30, p. 16, para. 14 (Tan Sri Abdul Kadir Mohamed); pp. 49-50, paras. 11-12, 59, paras. 33 (6), 34; p. 35, para. 45, p. 40, para. 63 (2) (Professor Crawford).

[48] CR 2002/33, pp. 24-26, paras. 51-60 (Sir Arthur Watts).

[49] Memorial of Malaysia, Vol. 2, Ann. 9.

[50] Memorial of Malaysia, Vol. 2, Ann. 13.

[51] Memorial of Malaysia, Vol. 2, Ann. 15.

[52] Memorial of Malaysia, Vol. 2, Ann. 16.

[53] See, e.g. CR 2002/33, p. 26, para. 59 (Sir Arthur Watts).

islands, pursuant to the 1891 Convention. Britain, it is said, could have promised in 1891 that any future acquisitions of territory south of 4° 10' would be handed over to Dutch Borneo. On that basis there would have been no *nemo dat* problem. After all, someone *can* promise to give what they will get in the future to another, even if they do not have it now.

11. But the Court will immediately see that this alternative argument — if it was made and it was only hinted at — is absolutely hopeless. Although in theory a State could promise to hand over future-acquired territory to another State, it is obvious that such a promise would have to be explicit and would have to be discussed, and that it cannot be inferred from a boundary agreement which deals with existing territory, existing territorial claims and a boundary immediately created and effective immediately upon ratification. There is not a trace of a suggestion in the written record of any such promise as to the future. Moreover, such an interpretation would contradict the object and purpose of the 1891 Convention, which was, we agree, finally to settle the dispute concerning the area of overlapping claims. It was not the purpose of the Convention to create the possibility of later claims to still further, after-acquired islands, beyond that area and further to the east.

12. I should make one final point. Assume, for the sake of argument, not only that Malaysia is wrong about Sulu titles but that the Ligitan islands belonged in 1891 exclusively to the indigenous inhabitants and not to any State or Sultan. That is what you held to be the case for the *Western Sahara* prior to Spanish colonization[34]. On that assumption, no doubt, the Ligitan islands were not *terra nullius*. But they would not have been the subject of any State's sovereignty, not Spain, not the Netherlands, not the State of North Borneo under British protection. I note that the convergent legal analyses of the situation made in 1903 by Secretary of State Hay[35] and in 1905 by the British Foreign Office[36] both implicitly reject that possibility. Let us however assume that they were wrong to do so and that the islands were never Spanish. It would follow that the islands in the Ligitan Group were excluded from the scope of the 1907 Exchange of Notes and the 1930 Treaty. But they would still now be part of British North Borneo, that is to say, of Malaysia, because the

---

[34] *I.C.J. Reports 1975*, p. 16.

[35] Memorial of Malaysia, Vol. 3, Ann. 55.

[36] Memorial of Malaysia, Vol. 3, Ann. 66.

indigenous inhabitants of the Ligitan Group came to owe their allegiance to the BNBC and its successors in title, and to this day they owe it to Malaysia. They clearly have never owed any allegiance to Indonesia. The well-attested social facts associated with the islands — which Indonesia does not deny; not even Professor Pellet, with all his capacity for denial, denies those social facts — would have combined with BNBC, British and Malaysian *effectivités* to give the islands to Malaysia.

13. For these reasons, Mr. President, Members of the Court, Sir Arthur's attempt to deal with the *nemo dat* argument is, with respect, wholly unconvincing. In fact I do not think it convinced Professor Pellet. Why else would he have attempted the heroic and hopeless task of trying to prove that Indonesian *effectivités* over these islands were greater than Malaysian? On the theory of the case adopted by Indonesia and by Professor Pellet in the first round, there was no need to do so. Instead counsel for Indonesia could and did rely on the rules concerning prescription, with their very high standard of proof on the State seeking to displace a pre-existing title. You heard Professor Pellet discuss it at length last week. By contrast I do not think that counsel for Indonesia used the word "prescription" on Monday. It has disappeared from the Indonesian vocabulary. Its disappearance is a tacit acknowledgment of the force of the two words *"nemo dat"*. Instead you had, from Professor Pellet: "some facts are better than no facts . . .". Mr. President, that is not a rule relevant to prescription.

(2) The 1900 Convention

14. Mr. President, Members of the Court, I turn to my second point, the 1900 Convention. I can be much briefer in relation to that Convention. Mr. Bundy accused me of trying to hide from it and of being embarrassed by it. In fact what there was to say about it we said. The 1900 Convention between Spain and the United States covered "any and all" Spanish islands beyond the 1898 Treaty of Paris lines. It was not limited to the islands of Cagayan Sulú and Sibutú which were particularly mentioned. If it had been so limited, it would not have covered the Turtle Islands and the Mangsee Islands, yet it is clear — and we agree — that it did cover them. The Court may recall my argument about liking cheeses, particularly camembert and gorgonzola — but I apologize, Mr. President, my liking for cheeses is causing me to repeat myself.

15. In any event, Secretary Hay's legal opinion of 1903 is quite clear on the point. I am sorry Mr. Bundy could not discuss it on Monday.

(3) The events of 1900-1907

16. I turn equally briefly to the events of 1903 to 1907. There are only two points that need clarification. Apart from these I leave the Court to read through the documents chronologically listed in tab 35 of our judges' folders for last week.

17. The first question of fact is this. Did the parties consider that only islands to the north of Sibutu were affected by the 1907 Exchange of Notes? The BNBC clearly did not think so; their memorandum and their map covered all the islands visited by the *Quiros* including Danawan — and they knew that Danawan was visited by the *Quiros*. So did the Durand map, which became the map annexed to the 1907 Exchange of Notes. The Sultan's Confirmation of 1903 — even though it was plainly invalid as a matter of law — also covered islands to the south-east of Sibutu, including all the inhabited islands in the Ligitan Group. All the facts point the same way.

18. The second question of fact is this. Did the United States spontaneously change its position as reflected in the 1903 Hydrographic Office map, which expressed a claim to all the islands of the Ligitan Group; or did they change their position — or rather stay their hand — because of British concerns, prompted by the BNBC? Mr. Bundy suggested on Monday that the decision was spontaneous and internal. Secretary Hay realized, perhaps in the middle of the night, that he had made a legal mistake. He had blundered and he spontaneously went back on his previous, apparently considered view, disowning the poor Lt. Boughter in the process. Probably not much turns on it, but as I read the record — admittedly not complete — it seems to me that the United States position changed because of discussions to be held with the British. If you refer back to the chronological list of documents, which is our tab 35, you will see that the crucial date is 23 October 1903, when instructions were given not to mark the boundary line on the map "until a mutual agreement has been arrived at between the United States and British governments"[57]. All subsequent internal correspondence presents the British negotiations as the reason for putting the

---

[57] See Memorial of Malaysia, Vol. 3, Ann. 63; Memorial of Indonesia, Vol. 3, Ann. 104.

issue on hold. There is no suggestion that the United States change of position — if that is what it was — was due to the Dutch, no suggestion at all.

19. I emphasize these facts because, quite apart from their legal significance, which I will not repeat, the whole transaction is a vivid testimony as to the factual situation in relation to precisely these islands. Mr. Bundy seemed to think that because the first edition of the Hydrographic Office map was put on hold, therefore nothing Lt. Boughter saw or said or reported can be relevant. But that is obviously not the case, and Sir Elihu will return to it shortly.

(4) The 1930 Convention

20. [Tab 84 — tab 39 of Malaysia's first round] Fourthly and finally I should say something about the 1930 Convention. Mr. Bundy repeated the trick of asserting there was no evidence for a proposition, while ignoring the evidence Malaysia had tendered. In this case Mr. Bundy's proposition was that the 1930 Convention did not affect the islands. He said that we had produced no evidence that the 1930 Convention affected the islands[58]. In fact, as you will recall, we did produce such evidence. It was of two kinds.

21. The first is the logical connection between the 1907 Exchange of Notes, the temporary arrangement for the administration of the offshore islands, and the 1930 Convention. Because the 1930 Convention made permanent, with certain important variations, what had previously been regulated by the 1907 Exchange of Notes and its annexed map, by definition, therefore, the scope of the two treaties was connected. The temporary arrangement became permanent, but with variations. All the islands, administered under the 1907 Exchange of Notes, all the islands — the phrase comes from the Exchange of Notes — which were not resumed by the United States in 1930 became permanently and for all purposes part of British North Borneo. Thus the annexed map of 1907, the Durand map, with its line down to 4° N, was by definition part of the 1930 arrangements, since it defined the basis upon which the 1930 Convention operated. Mr. Bundy virtually ignored that clear logical connection on Monday.

22. The second kind of evidence we produced was documentary: it is the evidence that the British Admiralty, at least, gave clear and close consideration to the scope of the 1930 Convention

---

[58] CR 2002/33, p. 54, para. 42 (Mr. Bundy).

prior to its conclusion, and that British officials considered unequivocally that it affected the offshore islands south of Semporna. The map on your screen —tab 84 in your folders — is our re-showing of the lines that were attached to the first of the two Admiralty memoranda of 1927, annexed to your folders in the first round[39]. That map, and the original which is also annexed, is clear evidence of the fact — the two Admiralty memoranda themselves are equally clear evidence of it. Mr. Bundy made no reference to them whatsoever. Let me, if I can interpolate a repetition, recall the conclusion, reached by the Admiralty in 1927, that under the proposed Treaty: "*British North Borneo* [this is under the 1930 Treaty] would receive Buaning, Lankayan, Mantatuan, Mataking and the Ligitan Islands, to none of which she has any valid claim."[40] Indonesia has chosen not to respond to this evidence.

23. It does not matter for this purpose whether the 1930 Convention is interpreted as a treaty of cession, or as a mere relinquishment of a claim to small islands which the United States never actually administered. What is clear from the record is that the BNBC had administered them and was continuing to do so, and that the issues were of concern exclusively to the United States and Great Britain. Whether the transaction is analysed as a relinquishment or a cession does not matter, its legal effect is precisely the same.

24. Mr. President, Members of the Court, to summarize briefly, the islands south of Semporna were Sulu islands. Those beyond 9 nautical miles from the coast were not granted to the BNBC by the Sultan in 1878, but the BNBC for practical reasons gradually extended its control over them, without any protest or action on behalf of Spain or the Netherlands. Nonetheless, their Spanish character was expressly acknowledged by the British in 1885, and they passed to the United States in 1900, as both the United States and Great Britain agreed. They were administered by the BNBC under the 1907 Exchange of Notes until 1932, when the 1930 Convention came into force. At that point, sovereignty over the islands lying to the west and south of the line on the 1930 Convention map firmly and finally vested in British North Borneo under British protection, in the absence of any claim or action by any interested third party. The Dutch never having claimed

---

[39] CR 2002/31, 7 June 2002, pp. 50-53, citing Memorial of Indonesia, Vol. 4, Ann. 123; Counter-Memorial of Malaysia, Vol. 2, Ann. 3.

[40] Counter-Memorial of Malaysia, Vol. 2, Ann. 3.

the islands, Indonesia lacks any trace of title over them. But even if the islands had not been Sulu, even if they had not been Spanish, even if they had not been American, they would now be Malaysian because Malaysia's predecessors claimed and administered them and no one else did.

Mr. President, that would be a convenient moment for a break.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. La séance de la Court est suspendue pour une dizaine de minutes.

L'audience est suspendue de 11 h 25 à 11 h 35.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne la parole au professeur Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court.

B. The map evidence

25. I turn now to deal with the map evidence. Let me start with two preliminary points concerning the geography and the maps.

(1) The "Ligitan Group" is not a concocted potion

26. This preliminary point concerns what Professor Pellet was pleased to describe as our invented reference to the "Ligitan Group": he called it *"soi-disant"*, a concocted potion uniquely invented for the purposes of the case[61]. So worried was Sir Arthur Watts about this concocted potion that he spent a quarter of his speech, which should have been on the 1891 Convention, talking about the Ligitan Group instead[62]. So let me show you that it was not a concocted potion but part of the original recipe and the original reality.

27. [Show MC-M, map 7, detail] I attach, at tab 85 in your folders, a list of maps in the record which use the phrase "Ligitan Group". You will see there are 14 maps that do so, ranging from 1881 to 1997. In the time available since Monday we have not been able to find all of the

---

[61] CR 2002/34, p. 31, para. 33 (Professor Pellet).

[62] CR 2002/33, pp. 12-17, paras. 2-24 (Sir Arthur Watts).

references in the documentary annexes to the Ligitan Group, but there are certainly some. Let me mention two items, one map and one document.

28. The first item is the map which is tab 86 in your folders and is on the screen: you have seen it before. It is the map published in Batavia in 1941[63], which I showed you last Friday. It shows the words "Ligitan Group" between the star-shaped reef and Sipadan Island. In case you were wondering, the number "(51)" in brackets next to Sipadan is a reference to the height of the top of the trees on Sipadan, and is there to aid mariners. Incidentally, we know the name of the BNBC subject who planted trees on Sipadan. Indonesia has not told us the name of any Dutch or Indonesian person who spent more than half an hour on the island at any time before 1969, let alone someone who planted trees.

29. The second document is the 1890 *British Sailing Directory* for "Borneo: North-East Coast", which you will find in your folders as tab 87[64]. The entry for the Ligitan islands cover Si Amil, Danawan, a small unnamed islet — which is actually Ligitan —, Sipadan and Mabul; the *Directory* then moves on to Sibuko Bay. This chapter covers everything down to the Sibuko River, the end of the 1878 Grant, and then it stops.

30. Indonesia argues that the second edition of the *Sailing Directory* does not list Sipadan as part of the Ligitan Islands[65]. It is true that there are significant changes between the 1890 and the 1904 editions of the *Sailing Directory*, no doubt as a result of new information arising from such voyages as that of the *Egeria*. Under the entry for Ligitan Islands, in the second edition, are covered everything from Si Amil to Mabul Islands; Ligitan islet is now mentioned by name, as is Kapalai; then Ligitan Channel to the north and Sipadan to the south of Mabul — it is only 8 nautical miles away. It is unclear from the text whether the Ligitan Islands entry include Sipadan but it is perfectly clear that Sipadan is still treated as part of "Borneo; North-East Coast". Later the *Directory* discusses Sebatik and it mentions the boundary pillars now placed there. There is no suggestion that any of the islands discussed under Ligitan Islands are not part of British North Borneo. [End MC-M, map 7, detail.]

---

[63] Counter-Memorial of Malaysia, Vol. 2, map 8.

[64] Counter-Memorial of Malaysia, Vol. 2, Ann. 1.

[65] For the second edition (1904) see Reply of Indonesia, Ann. 4.

31. These references entirely dispose of Professor Pellet's notion that the Ligitan Islands or the Ligitan Group are some sort of invented potion or poison pill being foisted on Indonesia. The term has been current for a long time. Of course, Sipadan is not physically part of the star-shaped reef; it is principally now serviced from Mabul, but historically its connection was, as we know, with Danawan.

(2) The classification of map evidence

32. My second preliminary point concerns the classification of the map evidence which I presented last week. You will remember category 1, the treaty maps — the great maps; category 2, the maps put forward as reflecting claims or even informal agreements or understandings at the inter-State level; and then the residual category 3. Ms Malintoppi suggested that this classification is too rigid, but a map is either annexed to a treaty or it is not. The internal Dutch map *was not so* annexed, and all attempts by Indonesia to turn it into a category 2 map have failed, as Professor Cot has shown you. In the result, Indonesia did not deny that all the maps I listed as category 1 or category 2 maps support Malaysia. None of them support Indonesia. In this context it is significant that there was no discussion from Indonesia on Monday of the 1888 Dutch map, or of the very many related statements made by the Dutch that they did not claim any territory east of Batu Tinagat, nor of the map annexed to the 1907 Exchange of Notes.

(3) Ms Malintoppi's 24 maps

33. With these preliminaries out of the way, let me turn to the maps alleged to support Indonesia's case. On Monday, Ms Malintoppi helpfully gave us — their tab 12, which was a list of 24 maps which, she said, support Indonesia's claims to the islands[66]. We have re-presented that list of 24 maps as tab 88 in our folder, with annotations. Ms Malintoppi is responsible for the identification of the maps, I am responsible for the annotations. The annotations show, first, whether the two disputed islands appear on the map, and secondly, if they do, how they are shown relative to any line on the map. I will take you to a few of the maps shortly, but let us look at the overall picture.

---

[66] CR 2002/34, pp. 19-21, paras. 33-36 (Ms Malintoppi).

34. [Show Malaysia Timor Sabah; no need to put in folders] First, the island of Sipadan does not appear on 15 of her 24 maps. It is not shown. Those maps accordingly can say nothing precise or specific as to its status.

35. Of the nine maps on the list on which the island of Sipadan appears, the island is shown to the south of a line drawn on the map in some, but not others. On five maps Sipadan is shown to the south of a line. Now, three of these are the early Stanford maps — they are Nos. 2, 5 and 6 on the list, which is tab 88. The Stanford maps show what appears to be a BNBC administrative boundary. On each of these maps Sipadan is shown to the south of the boundary and Ligitan to the north. At this time, as we know, neither island was actually part of British North Borneo, although by 1903 there is independent evidence that the BNBC was resolving disputes over turtle egg collection on Sipadan, an activity which continued and was later reinforced by legislation specifically applied to the island. These three administrative boundary maps do not actually attribute Sipadan to British North Borneo, but neither do they attribute it to the Netherlands, it is simply to the south of an administrative boundary. I should say that those maps were later replaced by administrative maps which showed a closed administrative boundary of Tawau, where there were no islands further to the east. That closed administrative boundary stopped well short of the islands, and then there was an open administrative district of Semporna which obviously includes the islands. Three of those maps showing the open administrative district of Semporna, Nos. 13, 14 and 19, are on Ms Malintoppi's list: and one of them you can see now on the screen. It seems to me obvious that these maps do not support Indonesia's case. But, of course, it is for you to decide.

36. I turn now to Ligitan. The island of Ligitan appears on 12 of the 24 maps listed by Ms Malintoppi. So its strike rate is higher, it is 50 percent, though quite often it is not named. But there is not a single map in the record which shows Ligitan, named or unnamed, south of any line on the map. You can check that for yourselves by looking at the 24 maps. Not a single one shows Ligitan to the south of the line. Not even the Explanatory Memorandum map, as I showed last week[67] and as Indonesia does not dispute. Of course the Explanatory Memorandum map did not have a line extending as far east as Ligitan. But if that line had been extended, it would have

---

[67] CR 2002/32, pp. 29-30, paras. 26-27.

shown Ligitan to the north of the line. And the fact is, whenever a map shows a line extending so far east, and shows Ligitan, it shows Ligitan to the north of the line, without exception.

37. So of Ms Malintoppi's maps, the number of maps which directly support a claim to Ligitan is zero; the number which can be read as supporting a claim to Sipadan is five, if you count the early Stanford maps; two, if you do not. I remind you that there are 77 maps of the region in the record. We could have multiplied editions of maps showing the line stopping at Sebatik, but maps are not to be unnecessarily multiplied, as William of Occam, the medieval philosopher, might have said if he'd been a lawyer.

38. Of course, Ms Malintoppi seeks to put the point in another way. She argues that maps showing lines in the sea south of Sebatik are evidence of the existence of an allocation line along the parallel of 4° 10' N pursuant to the 1891 Convention, even if the lines on the maps stop short of the islands (as most of them do), and even if they are not expressed to be allocation lines or international boundaries (almost all of them are not so expressed)[68]. In other words, she does not appear to argue that the maps are evidence of Indonesian sovereignty as such. Rather they are evidence of a cartographic practice which supports Indonesia's treaty claim.

39. [Tab 89 -- *Century Atlas* map] This argument calls for three comments. First, it disqualifies altogether those among her 24 maps which do not show a line along the parallel of 4° 10' N but show some other line. Let me give one example which Indonesia stressed on Monday, the *Century Atlas* map of 1897, a commercial map which you can see on the screen once more: it is No. 4 on Ms Malintoppi's list[69]. It shows something called a "Boundary of Dutch Possessions", but at no stage does it follow the 4° 10' N line, as you can see on the screen. Rather, it swings somewhat north so as to attribute Karakelong Island and other islands to the Netherlands. Moreover, if you look at it in detail, as now on the screen, you will see that the islands to the south of the line (none of which are in the right place to be the islands in dispute and none of which are named) are actually coloured red: they are British, they are not orange or Dutch. There seems to be a discontinuity between the very large lines showing so-called boundaries and the specific situation of the islands off Borneo, and that discontinuity is a feature of certain other maps in the

---

[68] CR 2002/34, pp. 16-17, paras. 20-21 (Ms Malintoppi).

[69] See Memorial of Indonesia Map Atlas, map 7 with enlargement.

record. But in any event, if the map record is inconsistent (which it is), this commercial map achieves the singular distinction of being inconsistent with itself!

40. Thus the *Century Atlas* map does not actually support Ms Malintoppi's main argument — because it manifestly does not show a 4° 10' line, and because it pictures islands to the south of the line as British. Nonetheless, Mr. Bundy, making a welcome return, sought to reinforce its status by emphasizing that it had been exhibited by the United States in the *Island of Palmas* arbitration[70]. Well, there were about 50 maps in that arbitration — the only complete set of maps appears to be in your library —, the *Century Atlas* map was one. Mr. Bundy did not bother to tell us what Arbitrator Huber said about that map. The Arbitrator noted that several maps, in particular the *Century Atlas* map, showed an island, Mata Island, which almost certainly did not exist. He noted that Mata Island was not shown on the only large-scale map "directly based on researches on the spot", which was one of the British Admiralty charts. He concluded that "only with the greatest caution use can be made of maps as indications of the existence of sovereignty over Palmas"[71]. In other words, he dismissed the *Century Atlas* map, which showed the Island of Palmas and specifically showed it to be American, not Dutch. The *Century Atlas* map was better evidence of United States sovereignty over Palmas than any Dutch or Indonesian map in the record of this case in respect of Sipadan and Ligitan, and yet it was dismissed, and of course the United States lost the case. So much for the authority of the *Century Atlas* map.

41. The second comment on Ms Malintoppi's argument is that, if she wishes to extend the 4° 10' line east, beyond that shown on maps, she has to explain why it stops short of Karakelong Island. The *Century Atlas* map line, on which she relies, goes well past it. On Friday I showed you that the 4° 10' line cuts through Karakelong Island[72]. We project a line along the 4° 10' parallel, giving land areas to the north to the British and to the south to the Dutch, then the British get the northern half of Karakelong Island, just as they got the northern half of Sebatik. Ms Malintoppi on Monday did not bother to say why the line should stop east of Ligitan and west of Karakelong Island. More importantly, perhaps, neither she nor other counsel for Indonesia have managed to

---

[70] CR 2002/33, pp. 49-50, paras. 20-22 (Mr. Bundy).

[71] (1928) 2 *UNRIAA* at p. 853.

[72] CR 2002/32, p. 39, para. 61.

explain why, if the parties in 1891 thought they were drawing an allocation line, they never discussed its length, its extent or its legal effect. [End tab 89]

42. And the third comment on Ms Malintoppi's argument, is that subsequent mapping practice could only be very, very secondary evidence of the interpretation of a treaty and, if so, the practice would have to be consistent on both sides. Here it is completely inconsistent. In particular, there is not a single Dutch or Indonesian map which shows an allocation line of the same character or length as the Dutch internal map does. Ms Malintoppi made no comment on the list of 22 Dutch and Indonesian maps I gave you last Friday[73]. To summarize, as support for an argument based on the interpretation of the 1891 Convention, the maps are feeble evidence indeed.

43. While I am on the *Island of Palmas* case, I should add that that particular dispute has nothing to do with our case. It concerned an island which was covered by the 1898 Treaty of Paris, not the Additional Convention of 1900, as Mr. Bundy appeared to imply[74]. That is not to say, however, that the Award is not useful as an example of method. It is very useful — in its distrust of what I have called category 3 maps[75], in its disdain for inchoate or merely theoretical titles[76], and in its robust support for possessory titles based on actual allegiance and contact with the indigenous people of a disputed island[77]. In these three respects, it provides something of a model, and also Mr. President, in respect of its brevity. In particular, I note Judge Huber's statement that:

> "If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be."[78]

A fortiori he can attach no weight to the maps if there are hardly any of them that support the claim.

44. Now, of the 24 maps on Ms Malintoppi's list, only two remain to be mentioned: these are Nos. 15 and 22 on her list. One is Malaysian and one is British. I will not be like Mr. Pellet and pretend that there is no evidence against my side, as it were: these two maps are problematic.

---

[73] CR 2002/32, p. 31, para. 31; Malaysian judges' folders, tab 64.

[74] CR 2002/33, p. 49, para. 21 (Mr. Bundy), p. 50, para. 24 (Mr. Bundy).

[75] (1928) 2 *UNRIAA* at p. 852.

[76] *Ibid.*, pp. 846, 869.

[77] *Ibid.*, pp. 851, 858, 862-866.

[78] *Ibid.*, p. 853.

Both have disclaimers. Both are contained in Malaysia's Map Atlas, in its Memorial and are discussed in the pleadings. Curiously, neither has of them has actually been discussed by Indonesia in the hearings, although Ms Malintoppi quickly showed both of them to you on Monday[79]. For the sake of completeness, let me deal with them.

45. [Tab 90 — Semporna (1967)] The first is the map which you can now see on the screen, and is tab 90 in your folders[80]. It is a Malaysian Ministry of National Mapping map of 1967, entitled simply "Semporna". It shows the 1930 Treaty line — to the right of the map — as a treaty line between the Philippines and Indonesia, despite the fact that the Treaty was between Britain and the United States. It shows Pulau Ligitan apparently above the dashed line entitled "Malaysia (Sabah)/Republic of Indonesia", which if that line represents the 4° 10' N parallel is wrong: it should be beneath the line. So there are a number of errors on the map. The map shows Sipadan as below that line. Overall it is wrong and misleading. It may even have misled Indonesia, since it was not long after the publication of that map in 1967 that Indonesia first made its claim to the islands. Helen's face is alleged to have started a war: it may be this map started a case. On the other hand, Malaysia was not misled for long. As soon as Malaysia learned of the Indonesian claim it rejected that claim and it has done so consistently since. This map has never been repeated by Malaysia nor adopted cartographically by Indonesia. [End map]

46. Ms Malintoppi argued in effect that this map is an admission against interest on the part of Malaysia, but there are three obvious answers to that. The first is that the map contains a disclaimer and is therefore, quite simply, not an admission. If I make a statement and at the same time say that my statement cannot be relied on, I have made no admission; if I tell you the time that suggests my clock may be wrong, I have not told you the accurate time, you are not entitled to rely on it. That is perfectly simple. Secondly, as the Court has made clear on several occasions, even official maps are not admissions against interest; they are simply evidence to be taken into account. The common law rules of admission against interest — part of the common law of evidence — are not to be imported into the international law of territorial title, any more than you allowed it to be imported into the law of maritime delimitation in respect of the Hoffman letter in

---

[79] CR 2002/34, p. 20, para. 34 (Ms Malintoppi).

[80] Memorial of Malaysia, Vol. 5, map 20.

the *Gulf of Maine* case. No doubt deliberate admissions by foreign ministers may be binding, but they do not carry disclaimers; and, anyway, cartographers are not foreign ministers. Cartographers are not immune from making mistakes, whatever immunities foreign ministers may have!

47. This map was produced by the central mapping authority only a few years after Sabah joined Malaysia. The mistake has not been repeated.

48. [Tab 91: operational navigational chart (1978)] I turn to the second map, a British map of 1978, which is tab 91 in your folders. It shows an allocation line proceeding east, then turning south-east — you can see it shown on the screen — leaving Ligitan clearly to Malaysia and Sipidan apparently to Indonesia. The map contains a disclaimer. It was produced after the critical date. It was obviously not relied on at any stage by Indonesia, which by 1978 was fully aware of Malaysia's claim to both islands. Nor is it opposable to Malaysia, which had nothing to do with its production. It is completely lacking in any legal or cartographic basis. It is completely isolated among the 77 maps of the disputed area which are in this case. Moreover it does not reflect the view or the legal position taken in this case by either Party. After five rounds of written pleadings in this case, both parties agree that *either* the two islands both belong to Malaysia, *or* that the two island belong to Indonesia. There is no middle position: *either* the 1891 Convention as interpreted in light of the internal map and the subsequent practice of the parties contained an allocation line along the 4° 10' parallel, *or* it did not. No other map or document has ever suggested that such a line, if it existed, could suddenly bend, or why it should do so at any particular point. Lacking any articulated rationale and any foundation in the legal positions taken repeatedly and deliberately by both Parties before the Court, this British map can, simply and safely, be ignored.

49. Mr. President, Members of the Court:, at the end of her speech on Monday, Ms Malintoppi showed you a series of 15 maps which, she said, supported Indonesia's claim. You may have been struck, as you watched them, by the diversity of the maps: some showed lines extending a few miles to the east of Sebatik, some further; some showed the islands, or at least one of them, many showed neither; some showed islands in the wrong place, and so on. Overall they were an extraordinary mixture, and only by a deliberate, I might say wilful, act of the imagination could they all be represented to show the same thing.

50. You may consider the following sample of 15 different maps as being rather clearer and more consistent, both with each other and with the historical and legal record. You will find these maps successively under tab 92 of your folders.

51. [Tab 92: Succession of 15 maps] First, we have the Dutch map, "East Coast of Borneo: Island of Tarakan up to Dutch-English Boundary" dated 1905, with the 4° 10' N line stopping at the east coast of Sebatik[81].

52. Then we have — by now you will be familiar with it — the map of British North Borneo (a Stanfords map, incidentally: a category A map), annexed to the 1907 Exchange of Notes. It shows the 4° 10' N line stopping at the east coast of Sebatik[82]. It was published officially.

53. Then, the 1913 Dutch map showing the administrative structure of the Southern and Eastern Borneo Residence. Sebatik, Nanukan, Tarakan and the small islands belonging thereto are shown. But not Sipadan and Ligitan. The 4° 10' N line stops at the east coast of Sebatik[83].

54. Then we have another Dutch map of the same year, showing the Southern and Eastern Division of Borneo in 1913, with the 4° 10' N line stopping at the east coast of Sebatik. This time the two islands in dispute are shown and named, but there is no indication of their being Dutch[84].

55. Then we have the map accompanying the 1915 Boundary Agreement — another category A map — with the 4° 10' N line stopping at the east coast of Sebatik[85].

56. Now we have the portrayal of the 1915 boundary line in the 1916 Dutch *Colonial Gazette*, showing of course exactly the same thing though in more polished and attractive form[86].

57. This map by the Dutch official, Kaltofen, is a hand-drawn ethnographic map of Borneo, dated 1917[87]. It has been suggested that the First World War prevented the Dutch from focusing on what was going on, that they had a sort of four-year period of collective amnesia, and that they failed to observe the administration of the peoples of British North Borneo. But this Dutch official

---

[81] Counter-Memorial of Malaysia, Vol. 2, map 2.

[82] Memorial of Malaysia, Vol. 5, map 6.

[83] Counter-Memorial of Malaysia, Vol. 1, insert 11.

[84] Memorial of Malaysia, Vol. 5, map 1.

[85] Memorial of Malaysia, Vol. 5, map 23.

[86] Reply of Malaysia, insert 9.

[87] Reply of Malaysia, insert 3.

certainly seems to have been rather observant. And he did not think that any line went out in the sea east of Sebatik, or that any of the people of the east were Dutch.

58. Now a 1935 map of East Borneo, in which, as you can see, the northern areas of Dutch East Borneo are actually projected above the margin of the map in order to get them to fit[88]. Whoever made this beautiful map evidently did not think there were tiny bits of Dutch East Borneo off the map in an east-north-easterly direction.

59. And here we have the cartographer of the prestigious *Atlas of the Tropical Netherlands* in 1938 who stopped the 4° 10' line at the east coast of Sebatik, and then superimposed on the Ligitan islands a town map of the southerly town of Balikpapan. It did not show the islands at all[89]. How careless of him!

60. And once again the 1941 map sheet North Borneo, which reflects the legal position at the time with complete accuracy and honesty[90]. Sipadan Island — you notice the abbreviation "I" — belongs to North Borneo. So does Ligitan Island — you have seen the words *Ligitan Group* already. The 4° 10' line stops at the east coast.

61. In 1952, turning from Dutch to British maps, what is now the Colony of North Borneo produces this map. You will see that Sipadan — if we go back to the full map, please — is actually shown below the map border. The island of Sipadan is located below the border and a specific attempt is made to show it. You will see also that the boundary stops at the east coast of Sebatik. The only reason for depicting Sipadan in that way must have been that it was considered to be part of British North Borneo[91].

62. The next year the colony shows its administrative districts, in a schematic map with no offshore islands. There is no line east of Sebatik. You can see that the administrative boundary of the Semporna district is open[92]. That there was an administrative boundary in precisely this

---

[88] Counter-Memorial of Malaysia, Vol. 2, map 5.

[89] Counter-Memorial of Malaysia, Vol. 1, Insert 12.

[90] Counter-Memorial of Malaysia, Vol. 2, map 7.

[91] Memorial of Malaysia, Vol. 5, map 17.

[92] Memorial of Indonesia, Map Atlas, map 10.

location is also shown on the map of the Semporna police district of 1958, by S. M. Ross, which you have already been shown[93].

63. Contrast Indonesia's continental shelf map of 1960 — a category B map — disclaiming any interest in the two islands[94].

64. And now the British Admiralty chart "Tawau to Tarakan" of 1960: no line east of Sebatik[95].

65. And finally the Malaysian map, "Bandar Seri Begawan" of 1976, which seems entirely clear in its portrayal of Malaysia's sovereignty over the Ligitan Group[96].

Conclusion

66. Mr. President, Members of the Court, summarizing variable and inconsistent maps falling within category 3 is not easy. That is what Ms Malintoppi had to do with her 15 maps, and I am sure she will agree that it was a thankless task. By contrast the maps I have just shown you are come in all three categories: Category A, treaty maps, category B, maps put forward as expressing the international claim of a State, as well as some category C maps. They include all of those three; they are completely consistent. I could have shown others, but I will not try your patience more.

67. Mr. President, Members of the Court, thank you for your careful attention throughout. May I ask you, Mr. President, to call on Sir Elihu Lauterpacht who will address Malaysia's *effectivités*.

The PRESIDENT: Thank you, Professor Crawford. J'appelle maintenant à la barre sir Elihu Lauterpacht.

---

[93] Memorial of Malaysia, Vol. 5, map 18.

[94] Memorial of Malaysia, Vol. 5, map 7.

[95] Memorial of Malaysia, Vol. 5, map 11.

[96] Counter-Memorial of Malaysia, Vol. 2, map 10.

Sir Elihu LAUTERPACHT: Mr. President and Members of the Court.

EFFECTIVITÉS

1. My task is to reply on the question of *effectivités* as dealt with by counsel for Indonesia in their second-round speeches.

2. There are some preliminary points to be made.

3. The first relates to the critical date. The position of Indonesia appears to have undergone some significant change. In his first speech, Sir Arthur Watts was absolutely clear on this subject: "the dispute now before the Court crystallized in 1969. For the purpose of admitting and assessing evidence of . . . State sovereignty, any conduct occurring after that date is to be disregarded"[97]. This limitation was imposed by Indonesia for the purpose principally of excluding evidence of the development since 1969 of the tourist facilities on Sipadan and especially the continuous presence there of scuba-diving facilities. All these activities have evidently been carried on with the authority, and under the sovereign control of Malaysia. Indonesia has not manifested its presence or supported its claim to status in any way. And so it is understandable that Indonesia has been concerned to exclude these post-1969 activities from consideration by the Court.

4. Professor Pellet, on the other hand, was not slow to introduce into his speech references to facts occurring after 1969. Thus he spoke of the Indonesian Note Verbale of 7 May 1988 as "the first of the long series of Notes protesting against the establishment of tourist equipment at Sipadan". He adhered also to Indonesia's reliance upon the *ex post facto* agreement in May 1988 to the construction of the light towers on Sipadan and Ligitan, a mere 26 years of after they had been built and had begun operations[98].

5. Now, Malaysia is not troubled by this change of position by Indonesia. Malaysia merely points to a following fact: so starved is Indonesia of examples of its own *effectivités* in respect of the islands prior to 1969 that it has been forced to have recourse to diplomatic assertions subsequent to that date, *not* as part of the diplomatic history of the dispute but as denial of the

---

[97] CR 2002/27, p. 23, para. 28.

[98] CR 2002/34, p. 24, para. 11 (Mr. Pellet): *"Il tient à ce que l'Indonésie a formellement donné son accord à l'entretien des deux lanternes. Il résulte en effet d'une note verbale indonésienne du 7 mai 1988."*

relevance of the continuity of Malaysian conduct during the past three decades. Anyway, for its part, Malaysia still adheres to its position that its title was fully established before 1969.

6. My second preliminary observation relates to the character of conduct that can properly be taken into account as *effectivités*. Professor Pellet took exception to one phrase in the definition of *effectivités* that I offered. I had spoken of *effectivités* as consisting of "conduct attributable to a State which evidences its authority in, *or in relation to*, the disputed territory"[99]. In using the expression "in relation to" the disputed territory I was doing no more than echoing the words used by this Court in the *Minquiers and Ecrehos* case when the Court said: "The Court further finds that the British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions *in respect of* the group [that is the Ecrehos group]."[100] "In respect of," not *on*. That was the concept and the expression that I reflected in the use of the phrase "in relation to". The conduct does not have to occur *physically* on the territory in question, but it must evidently relate to it — as do the principal *effectivités* that I shall presently recall.

7. Because some of these principal pertinent *effectivités* took the form of legislation, my learned friend, Professor Pellet, was understandably anxious to diminish their significance. So he introduced a reference to the decision of the Permanent Court of International Justice in the *Lotus* case[101] in support of his suggestion, echoing the words of the *Lotus*, that "nothing in the world prohibited the BNBC or the British administration from extending its laws and jurisdiction to persons, things or acts outside its territory" *[Translation by Malaysia]*[102]. Professor Pellet's objective was clear. It was to suggest that the fact that a State might legislatively seek to regulate certain matters did not mean that the area within which those matters occurred lay within its territory. His argument appears to have been: because a State may legislate extraterritorially, the fact that the BNBC legislated for Sipadan did not mean that Sipadan was part of the territory of the BNBC. But the example that he gave quite undermined the argument that he was seeking to promote:

---

[99] CR 2002/34, p. 22, para. 2 (Mr. Pellet).

[100] *I.C.J. Reports 1953*, p. 67; emphasis added.

[101] *P.C.I.J., Series A, No. 10*, p. 19.

[102] CR 2002/34, p. 26, para. 19.

> "All countries do it [that is, legislate to regulate matters outside their territory]. France does not permit its nationals to bring back in their baggage rare or protected specimens captured in Amazonian forests or in a reserve in Sierra Leone or on the high plateau of Madagascar — and without doubt likewise turtle eggs from Sipadan . . . it does not follow that these parts of Brazil, of Sierra Leone or of Madagascar — not even of Sipadan — are French or are claimed by the Republic." *[Translation by Malaysia.]*

8. What Professor Pellet appears to have overlooked is that the kind of legislation he is describing is quite different from the legislative acts of the BNBC that are pertinent here. For one thing, the legislation here in question was clearly intended to be territorial in its operation — to apply within the State of Borneo — the legislation actually said so, as we shall see; for another thing, the French legislation about which Professor Pellet theorizes is manifestly *not* extraterritorial in its operation. Note, please, the manner in which the legislation was described. It prohibits French nationals from bringing the protected specimens back in their baggage: that is the way that Professor Pellet described it. Thus the connecting link between the legislation and the prohibited conduct is, first, via French nationals, a nationality (as he put it, *"ses nationaux"*) and second, through the fact that the prohibited conduct takes place in French territory. The prohibited conduct is not the collection of the protected species aboard, that is a matter for the law of the country concerned. The conduct prohibited by French law is bringing it back into France in the collector's baggage. It is quite clear from the manner in which Professor Pellet described the French legislation that it did not take effect upon French nationals in Brazil, Sierra Leone or Madagascar, but only when they returned to France[103]. This citation of the *"Lotus"* principle is quite out of place in the present context. The question of extraterritorial legislation has nothing to do with the case now before this Court.

9. Turning to another aspect of Professor Pellet's argument. I do not dispute his observation that an essential element in *effectivités* is "the intention and the wish to act in the capacity of sovereign". I did not omit reference to this element out of any desire to conceal it, but only because my concern in that part of my argument was to speak of actual conduct. Of course, the intention to act *à titre de souverain* is an essential ingredient of *effectivités*, but a statement of such intention does not have to appear in every act of the State constituting *effectivités*. It is enough that the act in question is clearly an exercise of sovereign authority related to the territory in question

---

[103] CR 2002/34, p. 26, para. 19.

and carried out in pursuance of that sovereign authority. Legislation which refers to the territory in question, whether specifically or by implication, clearly falls into that category. To this I shall return in a moment.

10. In the same vein, counsel for Indonesia has tried to drive a wedge in respect of conduct on the islands between, on the one hand, actual presence and behaviour of private persons, whether the Bajau turtle egg collectors or fishermen, and, on the other hand, the sovereign authority and conduct of the State, whether the Sultan of Sulu, the BNBC, Britain or Malaysia. To this end Indonesia has, for example, asserted that the BNBC should be regarded as a private company engaged in commercial activity, whose conduct and administration could therefore not be regarded as of a public or sovereign nature. The falsity of this assertion is readily shown by recalling the terms of the Agreement of 1946 between the Company and the British Crown for the transfer to the Crown of what were there described as the *sovereign rights* of the Company over and to the territory of the State of North Borneo[104]. From 1881 to 1946, the Company was in law and in fact the Government of North Borneo, exercising therein normal powers of government. It was a rather unusual position for a company. But it was the position. It was not a unique position, for similar powers were exercised by other great overseas trading companies, in various parts of the world from the seventeenth century onwards.

11. What is more, when one speaks of *"effectivités"* in relation to the islands one is speaking of effective control and authority by this governmental entity. We are not speaking of the conduct of the Bajau Laut as such, the people who were subject to the authority of the Company. Indonesia has repeatedly referred to the *Kasikili* case in an attempt to liken the position of the Bajau Laut to that of the Masubia people who made use of Kasikili Island for agricultural purposes and whose conduct this Court found not to be *à titre de souverain*. But there is a major and significant difference between the two situations. In the *Kasikili* case there was no supportive legislation of the Mandatory Authority expressly referring to Kasikili as if it were part of South West Africa. Here, as I shall presently respectfully remind the Court, the position has been quite different.

---

[104] Memorial of Malaysia, Vol. 2, Ann. 30.

12. There is one other brief preliminary observation to be made, before I turn to the *effectivités* themselves. This relates to the unity of the island group of which Ligitan and Sipadan form a part. Evidently, counsel for Indonesia are troubled by this aspect of the case. They realize, no doubt, that if Ligitan and Sipadan are closely linked to their neighbouring islands which are unquestionably Malaysian, this strengthens the inference that Ligitan and Sipadan share the same national character as those other islands. Proximity and appurtenance, when associated with conduct on the ground, are major factors in identifying or establishing national sovereignty.

13. It may be helpful to mention here the passage in the Judgment of the Chamber of this Court in the *El Salvador/Honduras* case in 1992[105]. There, mention is made of the characteristics of Meanguerita as a "dependency" of Meanguera. The Chamber also referred to the *Minquiers and Ecrehos* case which acknowledged the position of the Minquiers group as a dependency of the Channel Islands[106].

14. Sir Arthur Watts argued at some length in his reply speech that there is no geological or geographical unity between Ligitan, Sipadan and their neighbours. What goes on under the waters is, I suggest, irrelevant for this case: What matters is what goes on above the surface. It is to be noted that Sir Arthur's contention that the islands do not form a geological or geographical unity did not extend in the case of Sipadan to a denial of their social or economic unity with the others in the group. As to Ligitan, he said only that the visits of fishermen from the neighbouring islands "do not make separate territories a 'unity'"[107]. He even observed in passing that "the Court has been supplied with no detailed statistical evidence as to their social or economic significance". Now, with all respect, it hardly lies in the mouth of Indonesia to regret a lack of "detailed statistical evidence" when its own pleadings are replete with unsubstantiated assertions of fishing and of the collection of turtle eggs by unnamed persons from Indonesia at unspecified times. It can reasonably be submitted on behalf of Malaysia that the video shown in the course of Ambassador Ariffin's speech provides cogent testimony of the presence and activity on Ligitan of the local Bajau fishermen. However, they did not in that film look like people who would be

---

[105] *I.C.J. Reports 1992*, p. 570.

[106] *I.C.J. Reports 1953*, p. 71.

[107] CR 2002/23, p. 16, para. 23.

zealously compiling statistics of their daily catch to satisfy Indonesia's demands for more specific evidence of their presence. It is an inescapable fact that the islands in question are linked economically and socially to those islands over which Malaysian title is not disputed. Indonesia has not denied that the right to collect turtle eggs was vested in the people of Danawan and that the economic interest in the value of those eggs is still vested in them. Moreover, if the accommodation available in Sipadan itself for the visiting tourist is deemed to be too simple, there is a fine and picturesque hotel at Mabul, indisputably Malaysian, which survives largely by providing accommodation to visitors to Sipadan.

15. In contrast with this, Indonesia neither claims nor provides any evidence of any physical presence of its own on the islands. Such evidence as it has produced of conduct "in relation to" the islands, I shall come back to later.

16. With your permission, Mr. President and Members of the Court, I shall now focus more closely on four of the specific *effectivités* adduced by Malaysia in support of its position. The criterion for my selection of these four items is that they are undoubted acts of governmental authority by Malaysia that specifically refer to Ligitan and Sipadan and have a continuing operation. I am, I must say, too old-fashioned to make liberal use of excerpts on the screen behind me. I venture, therefore, generally in this connection, instead, respectfully to commend to your special perusal Volume 4 of the Malaysian Memorial. This contains the documentary evidence of BNBC, British and Malaysian administration of the islands. It is very difficult, indeed impossible, as one turns the 111 pages of this volume, to escape the impact of the image provided by these documents of Malaysian presence in, and with respect to, the islands from 1878 to the present day. After that, turn, if you will, to the Indonesian pleadings. Where is there anything comparable? The answer, as I shall presently elaborate, is: nowhere. The Court will no doubt bear this in mind when recalling Professor Pellet's truly remarkable assertion on Monday that while Indonesia can invoke *some effectivités*, Malaysia can invoke *none*[108]! The manifest extravagance of such a contention can only cast doubt upon the credibility of all else that comes from that same source.

---

[108] CR 2002/34, p. 21, para. 1.

17. Let us look first at Proclamation XXX of 1914, made by the Governor of the State of North Borneo[109]. It is called "The Monopolies Proclamation". It authorizes the grant by licence of exclusive rights for any purpose. Admittedly, the Ordinance does not on its face state that it applies to Sipadan or Ligitan. It does, however, refer to monopolies "in the State" — that is, the State of North Borneo. Its territorial application — to Sipadan and Ligitan — is confirmed beyond doubt when, in 1916, the Acting Resident of the East Coast of British North Borneo sought the Governor's approval for a grant of the monopoly of collecting turtle eggs from Sipadan Island. The Acting Resident expressly referred to Ordinance XXX, enclosing in typed form a licence under Schedule II of the Ordinance. In fact, the Governor did not authorize the issue of the licence under the Ordinance because the right in question was, he considered, one "under customary native tenure and they have been allowed to exercise it for many years". Note, *allowed to exercise it*, words which clearly imply that the power existed also *not* to allow it. So, no licence was required under the Monopolies Ordinance. The Acting Resident was directed to issue a document, to be registered in the Magistrate's Office, in which the Government acknowledges the claims to the sole right to collect turtle eggs on Sipadan. At the bottom of the Governor's letter is an endorsement: "The necessary document is being issued."[110] The next Annex[111] contains a copy of the document, called a "Surat". Now, I make the point again: this is not just an isolated act that has to be treated as an *effectivité* of 1914. It is an event that is part of the continuing operation of the act, so that it extends over time. The act is merely the starting point of that particular *effectivité*.

18. We come then to the Turtle Preservation Ordinance of 1917[112]. This is an important document because it deals with the principal economic activity in Sipadan. It thus has the same kind of local significance that a petroleum law would have in an oil-producing country. This Ordinance expressly states, in Section 2, that no person shall without a licence take turtles or collect turtle eggs "within the State or the territorial waters thereof". The specific link with Sipadan comes in Section 3. This provides that areas specified in Schedule C shall be deemed to

---

[109] Memorial of Malaysia, Vol. 4, Ann. 93.

[110] Memorial of Malaysia, Vol. 4, Ann. 95.

[111] No. 98.

[112] Memorial of Malaysia, Vol. 4, Ann. 97.

be "native reserves" and the Ordinance is not to apply to the collection of turtle eggs by natives therein. There then follows a proviso: "provided that natives collecting turtle eggs in such areas shall be subject to any rules declared hereunder for the protection of the industry". Schedule C names three native reserves. One of them is Sipadan Island.

19. Malaysia has previously had occasion to explain that the identification of a native reserve does not evidence the exclusion of the reserve from the Borneo territory. Indeed, it is clear from the proviso that I have just read, regarding the applicability of "any rules declared hereunder", that it was foreseen that Borneo legislation could apply to the native reserves, including Sipadan.

20. Annex 102 in the same volume contains a licence granted in 1954 under the same Ordinance to the Cocos Islander Headman of Balung Estate, a company in Tawau, to take turtles "within the following limits; that is to say Cowie Harbour and adjacent coastal waters north of the territorial boundary to a line drawn due east from Tanjong Nagos". There then follows a statement of particular relevance here: "this area includes the islands of Sipadan, Ligitan, Kapalai, Mabul, Dinawan and Si Amil". So we have here three indications of importance: the first is that the Ordinance applies to both Sipadan and Ligitan; the second is that they were regarded as north of the territorial boundary; and the third is that they form part of a group of islands, the names of which I have just read. This licence is, moreover, a document which bears the heading "Colony of North Borneo", as well as the subheading "Turtle Preservation Ordinance, 1917" and is signed by the District Officer, Tawau. The fact that the Balung Estate was subject to the authority of the District Officer at Tawau is further evidenced by Annex 103 in the same volume, which is a letter from the District Officer at Lahad Datu conveying a complaint that the Cocos islanders were catching turtles in the vicinity of Sipadan. The follow-up to this can be seen in Annex 104.

21. I turn next to another clear illustration of legislative activity applicable to Sipadan, namely, the establishment of the Megapode Preserves. This was done pursuant to the North Borneo Land Ordinance of 1930. In 1933 a Notice made under Section 28 of the Ordinance was published in the *Official Gazette* of North Borneo[113]. "The islands in Lahad Datu District described in the schedule hereto are reserved for the purposes of bird sanctuaries." Sipadan Island and one

---

[113] Memorial of Malaysia, Vol. 4, Ann. 101.

other are then described. Also the acreage of Sipadan is specifically mentioned: 7.68 acres. Now the establishment of so precise a figure must surely be an indication that the island had been surveyed. Therefore, it must have been visited by a surveyor. Who could he have been, other than a North Borneo government official, for no one else in the area — certainly not the Bajau Laut — would have had the necessary surveying skills or a reason to carry out such a survey? So there we have another item of *effectivités* on the ground.

22. Now a word about the light towers. There is no need to enter into a semantic dispute about the correct description of structures that are undoubtedly in place and perform a nightly function of helping passing mariners. Lighthouse, light tower, lantern, meccano structure: it matters not. What does matter is that lights were constructed by Malaysia on both Sipadan and Ligitan and have been maintained continuously by Malaysia. Mention was made of the Sipadan light in the Colony of North Borneo Annual Report for 1960[114]. The Sipadan light was the subject of an official public and widely available notice to mariners in 1962. It was described as being "exhibited on a steel lattice tower 72 feet high painted white". A similar notice in 1963 announced the establishment of the Ligitan light[115].

23. Professor Pellet mocked these lights saying "after their construction they were hardly the object of attention on the part of an independent Malaysia". And for his information he relied on one of the several Indonesia's litigation-generated affidavits all sworn in 1999. The particular affidavit was by Sergeant Major Ilyas. He surmised that the faded paint of the "lighthouse" — Indonesia's word, not mine! — was "due to lack of maintenance". But a moment's thought might have led Sergeant Major Ilyas to have realized that it is not paint that demonstrates the maintenance of a lighthouse, but fuel. The lights were built at a period before the emergence of solar powered batteries. Who did the Sergeant Major think regularly replenished the source of power for the lights? Certainly, it was not the Indonesians, otherwise they would no doubt have told us. The answer is in a letter dated 2 August 1973 from Mr. Walls of something called Pengarah Laut —which is the Director of Marine —, to the Director of Land and Surveys at Kota Kinabalu: "These are unwatched Light Towers . . . serviced at six monthly intervals — April/October

---

[114] Memorial of Malaysia, Vol. 4, Ann. 111.

[115] Memorial of Malaysia, Vol. 4, Ann. 113.

yearly — and in continuous operation for coastal navigation."[116] Unwatched, means unmanned, not unmonitored. The lights continue to work — as we saw in the video last Thursday. Is this not evidence not merely of official Malaysian activity in relation to the islands but also of official Malaysian activity *on* the islands? Activity regularly carried out?

24. Finally, on the subject of evidence of Malaysian administration, a very brief word is called for about a much earlier episode, the evidence derived from the visit of the USS *Quiros* in 1903. I mention here Lt. Boughter's report, not in relation to the question of the chain of title — this matter has been dealt with by Professor Crawford. Rather, Lt. Boughter's report regarding the administration of the islands by the BNBC is pertinent as evidence of the fact of British administration. It is an objective acknowledgement of the factual situation at that time in 1903, coming not from either party but from a third party with an interest in accurate observation. As such, its value must be recognized.

25. Enough has been said, I suggest, to meet the principal points of criticism by Indonesia of Malaysia's *effectivités*. If I do not go over all the other aspects of that activity, it is only out of respect for your admonition, Mr. President, to be restrained in this second round. But I am bound to affirm that Malaysia adheres to all that it has said on *effectivités* in its written pleadings and in the first round of these hearings.

26. I come, lastly, to contrast with the evidence of Malaysian activities the paltry evidence of Indonesian activity. I shall be brief because there is now so little left still to be said about so little. I have no intention of reminding the Court in any detail of the greatness that Indonesia has thrust upon the *Lynx* and its seaplane of sometimes unpredictable performance. The paucity of Indonesian evidence speaks for itself. But one feature of Netherlands and Indonesian activity (or inactivity) may properly be recalled in the form of two brief citations from the Judgment of the Chamber of this Court in the *El Salvador/Honduras* case. Both relate to the importance of protest and the significance of silence in relation to *effectivités*. The quotations appear in the part of the Judgment dealing with title to the island of Meanguera which was in the possession of El Salvador but to which Honduras laid claim.

---

[116] Memorial of Malaysia, Vol. 4, Ann. 115.

27. The first quotation is this:

> "Throughout the whole period covered by the documentation produced by El Salvador concerning Meanguera, there is no record of any protest made by Honduras to El Salvador, with the exception of one recent event, to which reference is made below."[117]

The second quotation relates to the recent event that the Chamber had in mind — a protest made by Honduras on 23 January 1991:

> "The Chamber considers that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation. Furthermore, Honduras has laid before the Chamber a bulky and impressive list of material relied on to show Honduran *effectivités* relating to the whole of the area in litigation, but fails in that material to advance any proof of its presence on the island of Meanguera."[118]

28. Is that not an almost exact description of the situation here? Indonesia has produced a lot of paper — see, for example, Volume 4 of its Counter-Memorial. But it has not produced one protest during the important, pre-critical date period, from 1891 to 1969, and not one proof of its presence on the islands. Is that not, to use the words of the Chamber, "an admission, recognition, acquiescence or other form of tacit consent to the situation"?

29. So, Mr. President and Members of the Court, I come to my last question — a mercifully short one. The question is simply this: need I say anymore? I provide you with an immediate answer. I shall conclude my argument forthwith.

But before I resume my seat, there is one point of a personal nature that requires to be made. Not personal to me, but to my eminent friend, Professor Jean-Pierre Cot. He has been elected a judge of the International Tribunal on the Law of the Sea and will soon take his place there. This means that he will no longer be able to appear in this Court. His departure will be a grave loss to international advocacy. He is too modest to have brought this event to your notice, but I venture to do so and to express our collective congratulations and good wishes to him on his elevation to the judicial ranks.

---

[117] *I.C.J. Reports 1992*, p. 574, para. 361.

[118] *I.C.J. Reports 1992*, p. 577, para. 364.

May I ask you now, Mr. President, notwithstanding the fact that we are so close to one o'clock, kindly to call upon the distinguished Agent of Malaysia, Tan Sri Kadir, to make his final and relatively brief submission. Thank you very much, Mr. President.

Le PRESIDENT : Je vous remercie, sir Elihu. Je donne maintenant la parole à S. Exc. M. l'agent de la Malaisie.

Mr. MOHAMAD:

1. Mr. President and distinguished Members of the Court, the delegation of Malaysia values greatly the opportunity it has had in these two weeks to explain to you Malaysia's stand that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

2. Malaysia is looking forward to the Court's decision on this case, which will settle the dispute over the two islands, because it will be a peaceful and friendly settlement of the question.

3. It will be a matter of pride and satisfaction for us that in one episode in the diplomatic history of relations between Malaysia and Indonesia, the International Court of Justice has an important part to play. We hope that the Court's role in this matter will contribute to the maintenance of peace and stability in south-east Asia, both in the particular decision you give and in its example for the future settlement of boundary and territorial disputes.

4. Mr. President, Members of the Court, let me summarize the issues Malaysia has sought to show. First, that it has, and for many years has had, a good title over Ligitan and Sipadan while Indonesia has none. Second, and at the same time, that Ligitan and Sipadan have been in the possession and subject to the actual administration of Malaysia and its predecessors in title, while it was impossible for Indonesia to assert the same. Third, that the claim that the 1891 Convention created an allocation line east of Sebatik, and thereby silently gave these two small islands to the Netherlands, has no foundation in law or fact. In its written pleadings and during the course of these hearings, Malaysia has demonstrated each of these three things.

5. Indonesia has maintained primarily that it acquired a clear treaty title from the 1891 Boundary Convention, that this was its basis of claim. On this point, Malaysia has conclusively shown that the Convention had no relevance to the islands of Ligitan and Sipadan. It has shown that the language of the Convention did not have the meaning attributed to it by Indonesia; that the

internal Dutch map does not have the effect Indonesia asserts, and that anyway the 1891 Convention could not have produced any effect because the two islands certainly did not belong to British North Borneo at that time.

6. Then, on the final day of its pleadings we heard our opponents state in the alternative and as a subsidiary argument that, if the Court were to find the 1891 Boundary Convention incapable of conferring sovereignty over Ligitan and Sipadan to the Netherlands, their sovereignty over the two islands could equally be established as successor in title from the Sultan of Bulungan[119]. But, as you have seen, there is no evidence whatever of Bulungan having any authority over the Ligitan Group. Malaysia produced expert evidence on the point which Indonesia did not reply to and which it has not been able to refute. The Dutch Government before 1891 was quite clear as to the extent of its claims, which did not extend to the islands. The various contracts between the Netherlands and the Sultan identified specific islands as belonging to Bulungan. These never included Ligitan and Sipadan which were, respectively, some 42 and 55 nautical miles away from the land-based Sultanate of Bulungan. The same was true of the supplementary contract of 1891, which replaced the 1878 definition of the boundaries of Bulungan and the islands belonging to it.

7. Although the different Malaysian arguments all point the same way, I do particularly wish to emphasize the element of long and uninterrupted possession, going back to the years after the grant of 1878. Indonesia's Agent emphasized that, no doubt unintentionally, when he said in his final remarks on Monday that Indonesia, if it won this case, would respect any rights over the islands duly acquired under Indonesian law[120]. But that is precisely the point: no rights have ever been acquired over the islands under Indonesian law, which has never mentioned the islands and has never been applied there. The rights which people have over the islands have been acquired under Malaysian law, not Indonesian law. The Court has always respected the principles of stability and continuity in territorial administration, and I respectfully call on you now to do so. If an Asian State can come along, 80 years after a boundary treaty was concluded, and claim islands in the peaceful possession of another Asian State on the basis of an argument about the

---

[119] CR 2002/34, p. 37, para. 3 (Professor Pellet).

[120] CR 2002/34, p. 40, para. 5 (Mr. Wirajuda).

interpretation of the Treaty which has never before been made, then I fear that this case will be a source of serious instability, with implications reaching far beyond these two islands.

8. Accordingly, since Malaysia has administered Ligitan and Sipadan and Indonesia has not, the position in 1969, and now, is that Malaysia has sovereignty over the islands and Indonesia has not. The events between Great Britain and the United States after 1903 show clearly what the status quo was on the islands, and they show the Dutch had no interest in them. They further show how the United States eventually relinquished its earlier claim to the islands by reason of the 1907 Exchange of Notes and the 1930 Convention.

9. Mr. President, that leaves me with one final point to deal with. At the end of its pleadings, Indonesia alluded again to the so-called understanding of 1969. In order to refrain from repeating the explanation I have already given in my opening remarks last week, let me just say that the text of the 1969 Exchange of Letters made no reference to the disputed islands, that it is not a "standstill" agreement and that it has no relevance to the present case[121]. Indonesia made reference to an affidavit of Professor Mochtar Kusumaatmadja made in 1999, some 30 years after the 1969 negotiations between Indonesia and Malaysia and *well* after the present case came before the Court. May I just point out that whatever Professor Mochtar said in the affidavit was entirely his own recollections only. There is no record which can confirm what he said, and his recollections do not coincide with those on the Malaysian side. Of course the two States were obliged to settle their disputes peacefully, but there was no agreement that Malaysia would not maintain and extend its authority over the islands, and Indonesia's claims in that regard are entirely without foundation.

10. Mr. President, distinguished Members of the Court, on behalf of the Government of Malaysia, counsel for Malaysia, the Co-Agent and myself as Agent, I would like to thank the Court for the patience with which it has heard Malaysia's presentation of its case. I would also like to thank the members of the Indonesian delegation for the courtesy they have shown to us during the course of the pleadings. We also thank the staff of the Registry and the Court interpreters.

11. Mr. President, may I respectfully request the Court to confirm Malaysia's sovereignty over Ligitan and Sipadan, and second, to reject Indonesia's claim based upon its interpretation of

---

[121] CR 2002/30, p. 17, paras. 15-19 (Mr. Mohamad).

the 1891 Boundary Convention between the Dutch and the British, or its subsidiary and alternative claim as successor-in-title from the Sultan of Bulungan. On that basis I reaffirm Malaysia's submissions as set out in its written pleadings, as follows:

The Government of Malaysia respectfully requests the Court to adjudge and declare that sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia.

Mr. President, distinguished Members of the Court, I thank you.

Le PRESIDENT : Je vous remercie, Monsieur l'agent de la Malaisie. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la Malaisie, comme elle l'a fait le 10 juin pour les conclusions finales présentées par M. l'agent de la République d'Indonésie.

Ceci nous amène à la fin de cette semaine et demie d'audiences.

Je tiens à adresser mes remerciements, pour leurs interventions, aux agents, conseils et avocats des deux Parties pour la qualité de leurs plaidoiries et pour la courtoisie qui a régné pendant ces audiences.

Conformément à la pratique, je prierai les agents de rester à la disposition de la Cour pour tous renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve, je déclare close la procédure orale en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie).*

La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt.

La Cour n'est saisie d'aucune autre question aujourd'hui et ceci met donc un terme à l'audience de ce jour. Je rappellerai simplement que des audiences se tiendront demain, à 10 heures, en l'affaire des *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda)*, aux fins d'entendre les observations des Parties au sujet de la demande en indication de mesures conservatoires présentée par la République démocratique du Congo le 28 mai dernier.

L'audience est levée à 13 h 20.

Séance publique du 17 décembre 2002, à 10 heures
Affaire relative à la Souveraineté sur Pulau Ligitan et Pulau Sipadan
(Indonésie/Malaisie)

Le PRÉSIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour est aujourd'hui réunie, conformément à l'article 58 du Statut, pour rendre en séance publique son arrêt en l'affaire relative à la *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie).*

Je rappellerai que l'instance a été introduite par la notification conjointe au Greffe, le 2 novembre 1998, d'un compromis entre la République d'Indonésie et la Malaisie.

M. Al-Khasawneh, qui a assisté aux audiences publiques et participé au délibéré et au scrutin final, a malheureusement été empêché, pour des motifs qui ont été exposés à la Cour, d'être aujourd'hui présent sur le siège.

Conformément à l'usage, je ne donnerai pas lecture des paragraphes qui retracent les principales étapes de la procédure et reproduisent les conclusions des Parties. J'entamerai donc la lecture de l'arrêt au paragraphe 14 dans lequel la Cour décrit les deux îles du différend :

[Le président lit les paragraphes 14 à 150 de l'arrêt[1]]

Je prierai à présent le greffier de bien vouloir lire le texte du dispositif en anglais.

[The Registrar reads the operative clause in English[2]]

Le PRÉSIDENT : M. le juge ODA joint une déclaration à l'arrêt; M. le juge *ad hoc* FRANCK joint à l'arrêt l'exposé de son opinion dissidente.

Comme à l'accoutumée, le texte de l'arrêt est disponible sous forme multicopiée. Il a été également placé sur le site Internet de la Cour. Le texte imprimé sera disponible dès que possible.

La Cour n'ayant pas d'autre point à son ordre du jour, je déclare l'audience levée.

---

[1] *C.I.J. Recueil 2002*, p. 634-686.

[2] *I.C.J. Reports 2002*, p. 686.

The publications of the INTERNATIONAL COURT OF JUSTICE may be ordered from any bookseller. For information regarding the sale of the Court's publications please write to the following:

United Nations Publications, 300 East 42nd Street, Room IN-919 J, New York, NY 10017,
United States of America. Tel. (+1-212) 963 83 02. Fax (+1-212) 963 34 89. E-mail:
publications@un.org

All enquiries other than with regard to purchase of publications should be addressed to the *Registrar of the International Court of Justice, Peace Palace, 2517 KJ The Hague, Netherlands.* Tel. (+3170) 302 23 23. Fax (+3170) 364 99 28. E-mail: mail@icj-cij.org

On peut acquérir les publications de la COUR INTERNATIONALE DE JUSTICE auprès des librairies spécialisées du monde entier. Pour tous renseignements, prière de s'informer à l'adresse suivante:

United Nations Publications, 300 East 42nd Street, Room IN-919 J, New York, NY 10017,
Etats-Unis d'Amérique. Tél. (+1-212) 963 83 02. Télécopie (+1-212) 963 34 89. Adresse
électronique: publications@un.org

Pour toutes questions autres que l'achat de publications, s'adresser à *Monsieur le Greffier de la Cour internationale de Justice, Palais de la Paix, 2517 KJ La Haye, Pays-Bas.* Tél. (+3170) 302 23 23. Télécopie (+3170) 364 99 28. Adresse électronique: mail@icj-cij.org

IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

9 789210 710848

ISSN 0074-4433
ISBN 978-92-1-071084-8